Fee Waivers

Prior to the passage of the Freedom of Information Reform Act of 1986, the FOIA authorized agencies to waive or reduce the customary charges for document search and duplication where it was determined that such action was "in the public interest because furnishing the information can be considered as primarily benefiting the general public."[45] As the Court of Appeals for the District of Columbia Circuit had emphasized, this provision "was enacted to ensure that the public would benefit from any expenditure of public funds for the disclosure of public records."[46] In January 1983, the Department of Justice issued fee waiver guidelines setting forth five specific criteria, developed in numerous court decisions, for federal agencies to apply in determining whether the public interest warranted a waiver or reduction of fees.[47] These criteria called upon agencies to determine: (1) whether there was a genuine public interest in the subject matter of the request; (2) whether the responsive records were informative on the issue of public interest; (3) whether the requested information was already in the public domain; (4) whether the requester had the qualifications and ability to use and disseminate the information; and (5) whether the benefit to the general public was outweighed by any commercial or personal benefit to the requester.[48]

The replacement fee waiver standard established by the FOIA Reform Act, effective as of April 25, 1987, now more specifically defines the term "public interest," by providing that fees should be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[49] In light of this new fee waiver provision, the Department of Justice issued new fee waiver policy guidance on April 2, 1987--which superseded its 1983 substantive fee waiver guidance, as well as that issued in November 1986 (concerning institutions and record repositories)--and it advised agencies of six analytical factors logically to be considered in applying the new statutory fee waiver standard.[50] These six factors, as incorporated in the Department of Defense's fee regulation, were applied and implicitly approved by the Court of Appeals for the

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[45] 5 U.S.C. § 552(a)(4)(A) (1982), amended by Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50 (1986).

[46] Ely v. United States Postal Serv., 753 F.2d 163, 165 (D.C. Cir.), cert. denied, 471 U.S. 1106 (1985).

[47] See FOIA Update, Jan. 1983, at 3-4.

[48] See id.

[49] Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-50 (codified as amended at 5 U.S.C. § 552(a)(4)(A)(iii) (1988)).

[50] See FOIA Update, Winter/Spring 1987, at 3-10; see also id. at 10 (specifying that previous "procedural" guidance on fee waiver issues remains in effect); FOIA Update, Jan. 1983, at 4.

Ninth Circuit in McClellan Ecological Seepage Situation v. Carlucci.[51]

The amended statutory fee waiver standard sets forth two basic requirements, both of which must be satisfied before properly assessable fees can, and should, be waived or reduced under the statutory standard.[52] Requests for a waiver or reduction of fees must be considered on a case-by-case basis and should address both of these requirements in sufficient detail for the agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question.[53]

In order to determine whether the first fee waiver requirement has been met--i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities[54]--agencies should consider the following four factors in sequence:

1. First, the subject matter of the requested records, in the context of the request, must specifically concern identifiable "operations or activities of the government." As the D.C. Circuit specifically indicated in applying the prede-

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[51] 835 F.2d 1282, 1286 (9th Cir. 1987); see also Sloman v. United States Dep't of Justice, No. 92 Civ. 4982, slip op. at 11-12 (S.D.N.Y. May 4, 1993); Hoffman v. IRS, No. 90-459, slip op. at 3 (D.D.C. Oct. 23, 1991).

[52] See FOIA Update, Winter/Spring 1987, at 4; see also Sloman v. United States Dep't of Justice, slip op. at 9 (two-pronged statutory test used to determine when fees should be waived); Hoffman v. IRS, slip op. at 2 (burden on requester to establish that fee waiver standard has been met); Martorano v. FBI, No. 89-1345, slip op. at 8 (D.D.C. Sept. 30, 1991) (requester not entitled to documents where he failed to provide agency with information necessary to justify a fee waiver, nor has agreed to pay fees).

[53] See FOIA Update, Winter/Spring 1987, at 6; National Sec. Archive v. DOD, 880 F.2d 1381, 1383 (D.C. Cir. 1989) (dictum) (fee waiver decisions made on "case-by-case" basis), cert. denied, 494 U.S. 1029 (1990); Wilson v. CIA, No. 91-0087, slip op. at 3 (D.D.C. Nov. 5, 1991) (agency must necessarily evaluate each fee waiver request); see also McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1285 (conclusory statements will not support fee waiver request).

[54] See, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (conclusory statements insufficient to make public interest showing); National Treasury Employees Union v. Griffin, 811 F.2d 644, 647 (D.C. Cir. 1987) (requester seeking fee waiver bears burden of identifying "public interest" involved); Sloman v. United States Dep't of Justice, slip op. at 11 (public interest requirement not met by merely quoting statutory standard); Schmanke v. United States Postal Serv., No. 92-701, slip op. at 2 (D.D.C. Dec. 30, 1992) (requester bears burden of identifying "with reasonable specificity" public interest to be served); Prows v. United States Dep't of Justice, No. 90-2561, slip op. at 2 (D.D.C. Mar. 30, 1992) (denial of fee waiver proper where plaintiff failed to identify specific public interest).

cessor fee waiver standard, "the links between furnishing the requested information and benefiting the general public" should not be "tenuous."[55] Although in most cases records possessed by a federal agency will meet this threshold, the records must be sought for their informative value in relation to specifically identified government operations or activities;[56] a request for access to records for their intrinsic informational content alone would not satisfy this threshold consideration.[57]

2. Second, in order for the disclosure to be "likely to contribute" to an understanding of specific government operations or activities, the disclosable portions of the requested information must be meaningfully informative in relation to the subject matter of the request.[58] It has been held that requests for information that is already in the public domain, either in a duplicative or a substantially identical form, may not warrant a fee waiver where the disclosure would not be likely to contribute to an understanding of government operations or activities where nothing new would be added to the existing public record.[59]

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[55] National Treasury Employees Union v. Griffin, 811 F.2d at 648.

[56] See, e.g., Atkin v. EEOC, No. 91-2508, slip op. at 27-28 (D.N.J. Dec. 4, 1992) (requested list of agency attorneys and their bar affiliations "clearly does not concern identifiable government activities or operations") (appeal pending); Nance v. United States Postal Serv., No. 91-1183, slip op. at 3-4 (D.D.C. Jan. 24, 1992) (disclosure of illegally cashed money orders will not contribute significantly to public understanding of operations of government).

[57] See FOIA Update, Winter/Spring 1987, at 6.

[58] Id.; Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (character of information proper factor to consider); Gray v. United States Dep't of Agric., No. 91-1383, slip op. at 3 (D.D.C. Nov. 25, 1991) (no showing that minute amount of relevant information that may be found among masses of irrelevant material will enlighten public understanding of agency's operations); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (union's allegations of malfeasance too ephemeral to warrant waiver of search fees without further evidence that informative material will be found), aff'd on other grounds, 907 F.2d 203 (D.C. Cir. 1990); Shaw v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 83,009, at 83,444 (D.D.C. Oct. 29, 1982) (denying fee waiver request so "broadly framed" it would include large amount of material uninformative on issue).

[59] See McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286 (new information has more potential to contribute to public understanding); Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 11-12 (D.D.C. Aug. 17, 1993) (no fee waiver for 2,340 pages of public court records); Harrison v. United States Nat'l Archives, No. 93-448, slip op. at 1-2 (D.D.C. May 21, 1993) (upholding agency denial of fee waiver request on voluminous amount of JFK assassination records already released under FOIA and available through National Archives and Records Administration); Atkin v. EEOC, slip op. at 28 (disclosure of information already in public domain has little if any potential for contributing to understanding of government activities);

(continued...)

3. Third, the disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.[60] Whether the "public at large" encom-

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[59](...continued)
Siminoski v. FBI, No. 83-6499, slip op. at 12 n.2, 13 (C.D. Cal. Jan. 16, 1990) (doubtful that rerelease of documents would contribute significantly to public understanding of agency's investigations); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 9 (D.D.C. Apr. 13, 1989) (no fee waiver for "564 pages of public court records"), aff'd, No. 89-5185 (D.C. Cir. Feb. 26, 1990); Conner v. CIA, No. 84-3625, slip op. at 2 (D.D.C. Jan. 31, 1986) (no fee waiver for information available in agency's public reading room), appeal dismissed for lack of prosecution, No. 86-5221 (D.C. Cir. Jan. 25, 1987); Blakey v. Department of Justice, 549 F. Supp. 362, 364-65 (D.D.C. 1982) (applying this principle under the previous statutory fee waiver standard), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (table cite); see also FOIA Update, Winter/Spring 1987, at 7; cf. Tax Analysts v. United States Dep't of Justice, 965 F.2d 1092, 1094-96 (D.C. Cir. 1992) (news organization not entitled to attorney fees because, inter alia, requested information already in public domain). But see also Sinito v. United States Dep't of Justice, No. 87-814, slip op. at 4-5 (D.D.C. Feb. 13, 1991) (although documents did not appear to add to information already disclosed in media, they were likely to contribute to public's understanding of government activities); Fitzgibbon v. Agency for Int'l Dev., 724 F. Supp. 1048, 1051 & n.10 (D.D.C. 1989) (agencies failed to demonstrate "public's understanding" of publicly available information in public reading rooms and reports to Congress); Coalition for Safe Power, Inc. v. United States Dep't of Energy, No. 87-1380, slip op. at 6-8 (D. Or. July 22, 1988) (material's availability in agency's public reading room only one factor to consider).

[60] See Wagner v. United States Dep't of Justice, No. 86-5477, slip op. at 2 (D.C. Cir. Mar. 24, 1987) (general public must benefit from release); Hoffman v. IRS, slip op. at 3 (no showing that information will contribute to understanding of IRS operations by anyone other than requester); D'Alessandro v. United States Dep't of Justice, No. 90-2088, slip op. at 10 (D.D.C. Feb. 28, 1991) (plaintiff failed to make requisite showing that request was in public interest); Frankenberry v. United States Dep't of Justice, No. 87-3284, slip op. at 2 (D.D.C. Sept. 20, 1989) (records used in requester's criminal prosecution are "personal" to requester and will not enhance public understanding); Cox v. O'Brien, No. 86-1639, slip op. at 2 (D.D.C. Dec. 16, 1986) (fee waiver denial proper where prisoners, not general public, would be beneficiaries of information pertaining to wholesalers for prison commissary); Crooker v. Department of the Army, 577 F. Supp. 1220, 1223 (D.D.C. 1984) (rejecting fee waiver under previous standard for information of interest to "a small segment of the scientific community," which would not "benefit the public at large"), appeal dismissed as frivolous, No. 84-5089 (D.C. Cir. June 22, 1984); see also National Treasury Employees Union v. Griffin, 811 F.2d at 648 (rejecting "union's suggestion that its size insures that any benefit to it amounts to a public benefit"); Fazzini v. United States Dep't of Justice, No. 90 C 3303, slip op. at 12 (N.D. Ill. May 2, 1991) (requester cannot establish public benefit merely by
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passes only the population of the United States has not yet been clearly resolved by the courts. One case has held that disclosure to a foreign news syndicate that publishes only in Canada satisfies the requirement that it contribute to "public understanding."[61]

As the proper focus must be on the benefit to be derived by the general public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not factors entitling him or her to a fee waiver.[62] Indeed, it is well settled that indigence alone, without a showing of a public benefit, is insufficient to warrant a fee waiver.[63]

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[60](...continued)
alleging he has "corresponded" with members of media and intends to share requested information with them), summary affirmance granted, No. 91-2219 (7th Cir. July 26, 1991), Schmanke v. United States Postal Serv., No. 89-1551, slip op. at 5 (D.D.C. Jan. 4, 1990) (mere fact that information relates to governmental activity is insufficient to demonstrate "public benefit"). But see Johnson v. United States Dep't of Justice, No. 89-2842, slip op. at 3 (D.D.C. May 2, 1990) (death-row prisoner seeking previously unreleased and possibly exculpatory information entitled to partial fee waiver because potential "miscarriage of justice . . . is a matter of great public interest"), summary judgment granted, 758 F. Supp. 2, 5 (D.D.C. 1991) (holding, ultimately, that FBI not required to review records or to forego statutory exemption for possibly exculpatory information).

[61] Southam News v. INS, 674 F. Supp. 881, 892-93 (D.D.C. 1987). But cf. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (basic purpose of FOIA is to hold governors accountable to governed).

[62] See, e.g., Nance v. United States Postal Serv., slip op. at 4 n.2 (fee waiver inappropriate where only purpose for seeking records is collateral attack on criminal conviction); Martorano v. FBI, slip op. at 9 (no indication release would benefit public; only person to benefit is requester); Perotti v. United States Dep't of Justice, No. C-1-89-844, slip op. at 4 (S.D. Ohio Apr. 26, 1991) (magistrate's recommendation) (requester failed to substantiate that fee waiver would benefit public rather than individual), adopted (S.D. Ohio Aug. 22, 1991); Warmack v. Huff, No. CV-88-H-1191-E, slip op. at 30 (N.D. Ala. May 16, 1990) (magistrate's recommendation) (fee waiver denial appropriate where disclosure benefits only person making request), adopted (N.D. Ala. Aug. 14, 1990), aff'd on other grounds, No. 90-7630 (11th Cir. Nov. 18, 1991); Crooker v. Department of the Army, 577 F. Supp. at 1223-24 (prison inmate's intent to write book about brother's connection with dangerous toxin not considered benefit to public).

[63] See, e.g., Wagner v. United States Dep't of Justice, slip op. at 2 ("indigency does not ipso facto require a fee waiver"); Ely v. United States Postal Serv., 753 F.2d at 165 ("Congress rejected a fee waiver provision for indigents."); Durham v. United States Dep't of Justice, slip op. at 12 n.10 (indigence alone does constitute adequate grounds for fee waiver); Rodriguez-Estrada v. United States, No. 92-2360, slip op. at 2 (D.D.C. Apr. 16, 1993) (continued...)

Additionally, agencies should evaluate the identity and qualifications of the requester--e.g., expertise in the subject area of the request and ability and intention to disseminate the information to the general public--in order to determine whether the general public would benefit from disclosure to that requester.[64] Specialized knowledge may be required to extract, synthesize and effectively convey the information to the public and requesters vary in their ability to do so.[65] Although established representatives of the news media, as defined in the OMB Fee Guidelines,[66] should readily be able to meet this aspect of the statutory requirement by showing their connection to a ready means of effective dissemination,[67] other requesters should be required to describe with greater

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[63](...continued)
(no entitlement to fee waiver on basis of plaintiff's in forma pauperis status under 28 U.S.C. § 1915); Perotti v. United States Dep't of Justice, slip op. at 4 (indigence does not entitle requester to fee waiver); Crooker v. Department of the Army, 577 F. Supp. at 1224 (indigence alone does not automatically entitle requester to fee waiver); see also S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6287 (specific fee waiver provision for indigents eliminated; "such matters are properly the subject for individual agency determination in regulations").

[64] See, e.g., Larson v. CIA, 843 F.2d at 1483 & n.5 (inability to disseminate information alone is sufficient basis for denying fee waiver request; requester cannot rely on tenuous link to newspaper); McClain v. United States Dep't of Justice, No. 91 C 241, slip op. at 5 (N.D. Ill. Nov. 27, 1992) (plaintiff's "contention that he intends to give the requested information to a reporter . . . [and] to two public interest groups" insufficient to show dissemination to public); Hoffman v. IRS, slip op. at 3-4 (principal consideration in fee waiver cases is requester's ability to disseminate information to general public; requester cannot satisfy statutory standard merely by representing that he will make information available to others); Fazzini v. United States Dep't of Justice, slip op. at 12 (plaintiff's intention to share requested information with members of media not evidence of ability to disseminate information to public); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 15 (denial of fee waiver upheld where requester "is incarcerated, has no apparent connection with the news media, and has no apparent access to facilities or personnel that might enable him to disseminate the information"); Eudey v. CIA, 478 F. Supp. 1175, 1177 (D.D.C. 1979) (articulating such approach under predecessor fee waiver standard); cf. Wilson v. CIA, slip op. at 2 (plaintiff's failure to demonstrate intent and ability to disseminate information no impediment to subsequently filing revised and perfected request).

[65] McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286 (fee waiver request gave no indication of requesters' ability to understand and process the information nor whether they intended to actually disseminate it); see FOIA Update, Winter/Spring 1987, at 7.

[66] OMB Fee Guidelines, 52 Fed. Reg. 10,011, 10,018 (1987); see also National Sec. Archive v. DOD, 880 F.2d at 1387 (elaborating on OMB definition of news media representative to include requester organization in this case).

[67] See FOIA Update, Winter/Spring 1987, at 8 & n.5.

substantiation their expertise in the subject area and their ability and intention to disseminate the information.[68]

Some decisions under the former fee waiver standard suggested that journalists should presumptively be granted fee waivers.[69] The Department of Justice encourages agencies to give special weight to journalistic credentials under this factor,[70] though the statute provides no specific presumption that journalistic status alone is to be dispositive under the fee waiver standard overall and such a presumption would run counter to the amended fee provisions which set forth a special fee category for representatives of the news media.[71] (For a discussion of news media requesters in the context of attorney fee awards under the FOIA, see Tax Analysts v. United States Department of Justice,[72] and Litigation Considerations, below.)

Additionally, the requirement that a requester demonstrate a contribution to the understanding of the public at large is not satisfied simply because a fee waiver request is made by a library or other record repository, or by a requester who intends merely to disseminate the information to such an institution.[73] Such requests which make no showing of how the information would be disseminated, other than through passively making it available to anyone who

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[68] See id.; see, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d at 66 n.11 (assertion that requester was writer and had disseminated in past, coupled with bare statement of public interest, insufficient to meet statutory standard); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286-87 (agency may request additional information; 23 questions not burdensome); Burriss v. CIA, 524 F. Supp. 448, 449 (M.D. Tenn. 1981) (denial of plaintiff's fee waiver request "based upon mere representation that he is a researcher who plans to write a book" held not abuse of discretion).

[69] See National Treasury Employees Union v. Griffin, 811 F.2d at 649; Goldberg v. United States Dep't of State, No. 85-1496, slip op. at 3-4 (D.D.C. Apr. 29, 1986), modified (D.D.C. July 25, 1986); Badhwar v. United States Dep't of the Air Force, 615 F. Supp. 698, 708 (D.D.C. 1985); Rosenfeld v. United States Dep't of Justice, No. C-85-2247, slip op. at 4-5 (N.D. Cal. Oct. 29, 1985), motion for reconsideration denied (N.D. Cal. Mar. 25, 1986); Leach v. United States Customs Serv., No. 85-1195, slip op. at 8-9 (D.D.C. Oct. 22, 1985).

[70] Accord FOIA Update, Fall 1983, at 14; see also FOIA Update, Winter/Spring 1987, at 8.

[71] See 5 U.S.C. § 552(a)(4)(A)(ii)(II) (1988); cf. National Sec. Archive v. DOD, 880 F.2d at 1383 (dictum) (fee waiver decisions are to be made on "case-by-case" basis); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1284 (legislative history makes plain that "public interest" groups must satisfy statutory test).

[72] 965 F.2d at 1095-96 (litigant's status as news organization does not render award of attorney fees automatic).

[73] See FOIA Update, Winter/Spring 1987, at 8.

might seek access to it, do not meet the burden of demonstrating with particularity that the information will be communicated to the public.[74] These requests, like those of other requesters, should be analyzed to identify a particular person who actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.[75]

4. Lastly, the disclosure must contribute "significantly" to public understanding of government operations or activities. To warrant a waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.[76] Such a determination must be an objective one; agencies are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is "important" enough to be made public.[77]

Once an agency determines that the "public interest" requirement for a fee waiver has been met, the statutory standard's second requirement calls for the agency to determine whether "disclosure of the information . . . is not primarily in the commercial interest of the requester."[78] In order to decide whether this requirement has been satisfied, agencies should consider the following two factors in sequence:

1. First, an agency must determine as a threshold matter whether the request involves any commercial interest of the requester which would be furthered by the disclosure.[79] A "commercial interest" is one that furthers a commercial, trade or profit interest as those terms are commonly understood.[80]

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[74] Id.

[75] Id.; accord National Treasury Employees Union v. Griffin, 811 F.2d at 647 (observing under previous standard that public benefit should be "identified with reasonable specificity").

[76] See Sloman v. United States Dep't of Justice, slip op. at 11-12 (information previously released to author and "more important[ly]" available in agency's reading room will not contribute significantly to public understanding of operations of government); Carney v. United States Dep't of Justice, No. 92-Cv-6204, slip op. at 16 (W.D.N.Y. Apr. 27, 1993) (requester's proposed dissertation, scholarly publishing, and tentative book publication found insufficient to establish that release would contribute significantly to public understanding) (appeal pending).

[77] Ettlinger v. FBI, 596 F. Supp. 867, 875 (D. Mass. 1984); see FOIA Update, Winter/Spring 1987, at 8.

[78] 5 U.S.C. § 552(a)(4)(A)(iii).

[79] See FOIA Update, Winter/Spring 1987, at 9.

[80] Id.; OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18; accord, e.g.,

(continued...)

Information sought in furtherance of a tort claim for compensation or retribution for the requester is not considered to involve a "commercial interest."[81] However, not only profit-making corporations but also individuals or other organizations may have a commercial interest to be furthered by the disclosure, depending upon the circumstances involved.[82] Agencies may properly consider the requester's identity and the circumstances surrounding the request and draw reasonable inferences regarding the existence of a commercial interest.[83]

Where a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order subsequently to compare it to the "public interest" in disclosure.[84] In assessing the magnitude of the commercial interest, the agency should reasonably consider the extent to which the FOIA disclosure will serve the requester's identified commercial interest.[85]

2. Then, an agency must balance the requester's commercial interest against the identified public interest in disclosure and determine which interest is "primary." A fee waiver or reduction must be granted where the public interest in disclosure is greater in magnitude than the requester's commercial interest.[86] Or, as one court phrased it when considering the balance to be struck under the predecessor fee waiver standard: "[I]n simple terms, the public should not foot the bill unless it will be the primary beneficiary of the [disclosure]."[87]

Although newsgathering organizations ordinarily have a commercial interest in obtaining information, agencies may generally presume that where a news media requester has satisfied the "public interest" standard, that will be the primary interest served.[88] On the other hand, disclosure to private reposi-

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[80](...continued)
American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (defining "commercial" in Exemption 4 as meaning anything "pertaining or relating to or dealing with commerce").

[81] McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1285.

[82] See FOIA Update, Winter/Spring 1987, at 9; Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (entity's "non-profit status is not determinative" of commercial status) (Exemption 4 case).

[83] See FOIA Update, Winter/Spring 1987, at 9.

[84] Id.

[85] Id.

[86] Id.

[87] Burriss v. CIA, 524 F. Supp. at 449.

[88] See FOIA Update, Winter/Spring 1987, at 10; accord National Sec. Archive v. DOD, 880 F.2d at 1388 (requests from news media entities, in furtherance of their newsgathering function, are not for "commercial use").

tories of government records or data brokers may not be presumed to primarily serve the public interest; rather, requests on behalf of such entities can more readily be considered as primarily in their commercial interest, depending upon the nature of the records and their relation to the exact circumstances of the enterprise.[89]

When agencies analyze fee waiver requests by considering these six factors, they can rest assured that they have carried out their statutory obligation to determine whether a waiver is in the public interest.[90] Where an agency has relied on factors unrelated to the public benefit standard to deny a fee waiver request, however, courts have found an abuse of discretion.[91]

An analysis of the foregoing factors routinely requires an agency to first assess the nature of the information likely to be released in response to an access request, because the statutory standard speaks to whether "disclosure" of the responsive information will significantly contribute to public understanding.[92] This assessment thus necessarily focuses on the information that would be disclosed, which in turn logically requires an estimation of the applicability of any relevant FOIA exemption(s). Yet the extent to which an agency must establish at the fee waiver determination stage the precise contours of its anticipated withholdings was raised in Project on Military Procurement v. Depart-

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[89] See FOIA Update, Winter/Spring 1987, at 10; see also National Sec. Archive v. DOD, 880 F.2d at 1387-88.

[90] See FOIA Update, Winter/Spring 1987, at 10.

[91] See, e.g., Goldberg v. United States Dep't of State, slip op. at 3-5 (agency policy of granting waiver of search fees but refusing to grant waiver of duplication fees for "public interest" documents held "both irrational and in violation of the statute"); Idaho Wildlife Fed'n v. United States Forest Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,271, at 84,056 (D.D.C. July 21, 1983) (reliance on regulation that proscribes granting of fee waiver where records are sought for litigation is abuse of discretion because regulation is overbroad in that it ignores "public interest" in certain litigation); Diamond v. FBI, 548 F. Supp. 1158, 1160 (S.D.N.Y. 1982) (agency may not decline to waive fees based merely upon perceived obligation to collect them); Common Cause v. IRS, 1 Gov't Disclosure Serv. (P-H) ¶ 79,188, at 79,351 (D.D.C. Nov. 8, 1979) (IRS cannot deny requests for waiver of search fees simply on ground that search would be burdensome), aff'd, 646 F.2d 656 (D.C. Cir. 1981) (table cite); Eudey v. CIA, 478 F. Supp. at 1177 (agency may not consider quantity of documents to be released); Fitzgibbon v. CIA, No. 76-700, slip op. at 1 (D.D.C. Jan. 19, 1977) ("An agency's determination not to waive fees is arbitrary and capricious where there is nothing in the agency's refusal of fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public.").

[92] 5 U.S.C. § 552(a)(4)(A)(iii).

ment of the Navy,[93] where the district court seemed to suggest that an agency must defend the contemplated application of FOIA exemptions in the fee waiver context with an index pursuant to the requirements of Vaughn v. Rosen.[94] Such a requirement not only is unprecedented, it is also unworkable--as it would compel an agency to actually process responsive records at the threshold fee waiver determination stage in order to compile the Vaughn Index. This would turn the normal, longstanding procedure for responding to FOIA/fee waiver requests on its head. Until a fee waiver determination has been made and (if a full fee waiver is not granted) the requester has agreed to pay all the assessable fees, the request is not yet ripe for processing because there has been no compliance with the fee requirements of the FOIA.[95] Because the decision on this issue in Project on Military Procurement would yield impracticable results, it should not be followed. Agencies should retain the general discretion, though, to consider the cost-effectiveness of their investment of administrative resources in their fee and fee waiver determinations.[96]

The FOIA does not specifically provide for administrative appeals of denials of requests for fee waivers. Nevertheless, many agencies, either by regulation or by practice, have appropriately considered appeals of such actions. The Court of Appeals for the Fifth Circuit and the D.C. Circuit have recently made it clear, moreover, that administrative appeal exhaustion is required for any adverse determination, including fee waiver denials.[97]

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[93] 710 F. Supp. 362, 366-68 (D.D.C. 1989); see also Wilson v. CIA, No. 89-3356, slip op. at 3-4 (D.D.C. Mar. 25, 1991) (agency may not deny fee waiver request based upon "likelihood" that information will be withheld); Sinito v. United States Dep't of Justice, slip op. at 5 (denial of fee waiver based upon claim of exempt status of documents inappropriate before validity of exemptions established).

[94] 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[95] See 5 U.S.C. § 552(a)(3); see also Vennes v. IRS, No. 89-5136, slip op. at 2-3 (8th Cir. Oct. 13, 1989) (agency under no obligation to produce material until either requester agrees to pay fee or fee waiver approved); Perotti v. United States Dep't of Justice, slip op. at 4-5 (where fee waiver properly denied, requester must comply with procedural requirements before documents are processed); Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983) (upholding regulation requiring payment of fees or waiver of fees before FOIA request is deemed to have been received); cf. Nance v. United States Postal Serv., slip op. at 3 (where fee waiver inappropriate and fees exceed $250, agency may refuse to begin search until requester makes advance payment).

[96] Cf. Rodriguez v. United States Postal Serv., No. 90-1886, slip op. at 3 n.1 (D.D.C. Oct. 2, 1991) (despite requester's failure to comply with exhaustion requirement, court suggests agency "consider" waiving de minimis fee).

[97] See Voinche v. United States Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) (requester seeking fee waiver under FOIA must exhaust admin-

(continued...)

FEES AND FEE WAIVERS

Prior to the FOIA Reform Act, the discretionary nature of the FOIA's fee waiver provision led the majority of courts to conclude that "the proper standard for judicial review of an agency denial of a fee waiver is whether that decision was arbitrary and capricious,"[98] in accordance with the Administrative Procedure Act.[99] This meant that a court could not "replace its own judgment for that of [an agency] without first concluding that the [agency's] decision was completely unreasonable and unfair."[100]

This standard was changed, however, with the passage of the FOIA Reform Act. A specific judicial review provision was included in the amended FOIA,[101] which now provides for the review of agency fee waiver denials according to a de novo standard. Yet this provision also explicitly provides that the scope of judicial review remains limited to the administrative record established before the agency,[102] and thus it is crucial that the agency's fee waiver denial letter create a comprehensive administrative record of all the reasons for the denial.[103] In this regard, agencies should also be aware that a challenge

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[97](...continued)
istrative remedies before seeking judicial review), petition for cert. filed, 61 U.S.L.W. 3820 (U.S. May 17, 1993); Oglesby v. United States Dep't of the Army, 920 F.2d at 66 & n.11, 71 ("Exhaustion does not occur until fees are paid or an appeal is taken from the refusal to waive fees."); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d at 209 (court declined to consider fee waiver request when not pursued during agency administrative proceeding); see also Rodriguez v. United States Postal Serv., slip op. at 3 (in fairness to agency and judicial economy, administrative appeal of fee waiver denial required before judicial review); Williams v. Executive Office for United States Attorneys, No. 89-3071, slip op. at 7 (D.D.C. Mar. 19, 1991) (requester seeking fee waiver must first exhaust his administrative remedies); cf. Campbell v. Unknown Power Superintendent of Flathead Irrigation & Power Project, No. 91-35104, slip op. at 3 (9th Cir. Apr. 22, 1992) (exhaustion requirement not imposed where agency ignored fee waiver request).

[98] Eudey v. CIA, 478 F. Supp. at 1176; see also Ely v. United States Postal Serv., 753 F.2d at 165; Ettlinger v. FBI, 596 F. Supp. at 871. But see Rizzo v. Tyler, 438 F. Supp. 895, 899 (S.D.N.Y. 1977) (agency fee waiver denial reviewed de novo).

[99] 5 U.S.C. § 706 (1988).

[100] Crooker v. Department of the Army, 577 F. Supp. at 1224.

[101] 5 U.S.C. § 552(a)(4)(A)(vii).

[102] Id.; see, e.g., American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d at 209 (judicial review limited to record before agency); Carney v. United States Dep't of Justice, slip op. at 16 (court's consideration of fee waiver request limited to record before agency).

[103] See National Treasury Employees Union v. Griffin, 811 F.2d at 648 (court may consider only information before the agency at time of decision);
(continued...)

to an agency's fee waiver policy is not automatically rendered moot where the agency reverses itself and grants the specific fee waiver request; courts may still entertain such challenges from plaintiffs who are frequent FOIA requesters.[104]

Because the FOIA Reform Act's statutory fee waiver provision has still received only relatively limited interpretation by the courts thus far,[105] it still remains to be seen how novel issues of interpretation regarding its "public interest" standard will be adjudicated. For additional guidance on any particular fee waiver issue, agencies may contact OIP's FOIA Counselor Service.

LITIGATION CONSIDERATIONS

A Freedom of Information Act lawsuit involves unique procedural and substantive concerns that even the experienced litigator might at first find bewildering. As one appellate court has frankly acknowledged: "Freedom of Information Act cases are peculiarly difficult."[1] To provide a general overview of selected FOIA litigation considerations, this discussion will follow a rough chronology of a typical FOIA lawsuit, from the point of determining whether jurisdictional prerequisites have been met to the assessment of costs on appeal.

Jurisdiction and Venue

The United States district courts are vested with exclusive jurisdiction over FOIA cases by section (a)(4)(B) of the Act, which provides in pertinent part:

> On complaint, the district court of the United States in the

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[103](...continued)
Larson v. CIA, 843 F.2d at 1483 (information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial); Fitzgibbon v. Agency for Int'l Dev., 724 F. Supp. at 1051 n.10 ("post hoc rationales" offered in response to lawsuit held untimely); Gilday v. United States Dep't of Justice, No. 85-292, slip op. at 5 (D.D.C. July 22, 1985) (agency cannot wait until after litigation has commenced before giving reasons for denying fee waiver); Allen v. DOD, No. 81-2543, slip op. at 12 (D.D.C. Aug. 24, 1984) (post hoc rationalization for fee waiver denial rejected); see also FOIA Update, Winter/Spring 1987, at 10; FOIA Update, Winter 1985, at 6.

[104] See Better Gov't Ass'n v. Department of State, 780 F.2d 86, 91-92 (D.C. Cir. 1986); Public Citizen v. OSHA, No. 86-705, slip op. at 2-3 (D.D.C. Aug. 5, 1987).

[105] See Hoffman v. IRS, slip op. at 3 (observing that relatively little precedent exists construing fee waiver standard).

[1] Miscavige v. IRS, No. 92-8659, slip op. 3284, 3285 (11th Cir. Sept. 17, 1993) (to be published).

> district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.[2]

Initially, it should be noted that subject matter jurisdiction is determined as of the date on which the complaint in a FOIA lawsuit is filed.[3] The Supreme Court ruled in 1980 that jurisdiction in a FOIA case is predicated upon the plaintiff showing that an agency has (1) improperly (2) withheld (3) agency records.[4] Thus, a plaintiff who does not allege any improper withholding of agency records fails to state a claim for which a court has jurisdiction under the FOIA.[5] In a companion case, the Supreme Court elaborated upon the definition of agency records, explaining that "an agency must first either create or obtain a record as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA."[6] More recently, in United States Department of Justice v. Tax Analysts, the Supreme Court further refined the agency record definition by requiring that a record be in the agency's possession for official purposes at

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[2] 5 U.S.C. § 552(a)(4)(B) (1988); see also Rogers v. United States, 15 Ct. Cl. 692, 698 (1988) (no FOIA jurisdiction in Court of Claims).

[3] Atkin v. EEOC, No. 92-3275, slip op. at 6-7 (D.N.J. June 24, 1993) (where plaintiff exhausted administrative remedies by paying requisite FOIA fees only after complaint was filed, court lacked subject matter jurisdiction in case) (appeal pending).

[4] Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980).

[5] See, e.g., Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 184 (D.N.H. 1993) ("The court thus lacks subject matter jurisdiction if the information was properly withheld under FOIA exemptions."); National Fed'n of Fed. Employees v. United States, No. 87-2284, slip op. at 39 (D.D.C. May 27, 1988) (The FOIA "authorizes this Court only to 'enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.'" (quoting 5 U.S.C. § 552(a)(4)(B))). But see Payne Enters. v. United States, 837 F.2d 486, 490-92 (D.C. Cir. 1988) (repeated, unacceptably long agency delays in providing nonexempt information found sufficient to create jurisdiction); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (court has jurisdiction to consider "agency's policy to withhold temporarily, on a regular basis, certain types of documents").

[6] Forsham v. Harris, 445 U.S. 169, 182 (1980); see also Rush Franklin Publishing, Inc. v. NASA, No. 90-CV-2885, slip op. at 8-9 (E.D.N.Y. Apr. 13, 1992) (mailing list generated and maintained by contractor for purposes of disseminating agency publication held not an agency record); Conservation Law Found. v. Department of the Air Force, No. 85-4377, slip op. at 8 (D. Mass. June 6, 1986) (computer program produced and possessed exclusively by government contractor in connection with contract to analyze federal data held not an agency record).

the time of the FOIA request.[7] (For a further discussion of "agency records," see Procedural Requirements, above.)

Whether an agency has "improperly" withheld records usually turns on the application of one or more exemptions applied to the documents at issue.[8] Of course, if the agency can establish that no responsive records exist,[9] or that all responsive records have been released to the requester,[10] the agency's refusal to produce them should not be deemed "improper" withholding within the meaning of the FOIA's jurisdictional provision. Similarly, an agency has not improperly withheld records where it is prohibited from disclosing them by a preexisting court order.[11] While the validity of such a preexisting court

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[7] 492 U.S. 136, 145 (1989).

[8] See United States Dep't of Justice v. Tax Analysts, 492 U.S. at 152-54 (nonexempt federal district court tax case opinions maintained by Justice Department's Tax Division found to be "improperly" withheld notwithstanding public availability through another source).

[9] See, e.g., Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d 105, 108-09 (9th Cir. 1992) (absent improper conduct by government, FOIA does not require recreation of destroyed records); Ray v. United States Dep't of Justice, 908 F.2d 1549, 1558-59 (11th Cir. 1990), rev'd on other grounds sub nom. United States Dep't of State v. Ray, 112 S. Ct. 541 (1991); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 17 (D.D.C. Apr. 13, 1989), aff'd, No. 89-5185 (D.C. Cir. Feb. 26, 1990). But see Cal-Almond, Inc. v. United States Dep't of Agric., No. CV-F-89-574, slip op. at 2-3 (E.D. Cal. Mar. 12, 1993) (where agency returned requested records to submitter four days after denying requester's administrative appeal, in violation of its own records-retention requirements, and court determined such records were required to be disclosed, agency must seek return of records from submitter for disclosure to requester); see also FOIA Update, Spring 1991, at 5 (advising agencies to afford administrative appeal rights to FOIA requesters in "no record" situations (citing Oglesby v. United States Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990))).

[10] See, e.g., Steffen v. United States Dep't of Justice, No. 89-3434, slip op. at 7-8 (D.D.C. July 12, 1990); Williams v. United States Dep't of Justice, No. 87-1567, slip op. at 1 (D.D.C. Nov. 5, 1987), summary affirmance granted, No. 87-5410 (D.C. Cir. Aug. 31, 1988); Southam News v. INS, 674 F. Supp. 881, 889 (D.D.C. 1987).

[11] See, e.g., GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 384-86 (1980); Freeman v. United States Dep't of Justice, 723 F. Supp. 1115, 1120 (D. Md. 1988); Legal Times, Inc. v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,234, at 80,585 (D.D.C. Sept. 2, 1980); see also FOIA Update, Summer 1983, at 5. But see also FOIA Update, Summer 1992, at 5 (advising that "protective orders" issued by administrative law judges do not qualify as such court orders).

order does not depend upon whether it is based upon FOIA exemptions,[12] it is the agency's burden to demonstrate that the order was intended to operate as an injunction against the agency, rather than as a mere court seal.[13]

A somewhat related principle under the FOIA, although one not at all well settled or commonly applied, is that in a rare case, a court may decline to order the disclosure of nonexempt information as a matter of "equitable discretion." The Court of Appeals for the District of Columbia Circuit has recognized that this principle can be applicable under "exceptional circumstances."[14] This principle should be advanced in court only under strongly compelling circumstances.[15]

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[12] See Wagar v. United States Dep't of Justice, 846 F.2d 1040, 1047 (6th Cir. 1988).

[13] Morgan v. United States Dep't of Justice, 923 F.2d 195, 197-99 (D.C. Cir. 1991); see, e.g., Armstrong v. Executive Office of the President, No. 89-142, slip op. at 8 (D.D.C. Sept. 3, 1993) ("[I]t is also clear that the Protective Order was not intended to act as a limitation on the Government's ability to determine the final disposition of these classified materials."); Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 13-14 (D.D.C. Aug. 24, 1993) (finding agency declaration failed to satisfy Morgan test and requiring more detailed explanation of intended effect of sealing order); McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. at 1-2 (D.D.C. July 12, 1993) ("While this court's sealing Order temporarily precluded release, that order was not intended to operate as the functional equivalent of an injunction prohibiting release. It was only approved by the court for the purposes of expediting this litigation and protecting information . . . until this lawsuit was resolved.") (appeal pending); see also Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1460-61 & n.7 (D.C. Cir. 1984) (state court order does not affect analysis or conclusion of federal court as to whether document "improperly withheld").

[14] See Halperin v. Department of State, 565 F.2d 699, 706 (D.C. Cir. 1977) (citing Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971)), cert. denied, 434 U.S. 1046 (1978); see also Weber Aircraft Corp. v. United States, 688 F.2d 638, 646 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 792 (1984); Patriarca v. FBI, No. 85-707, slip op. at 1 (D.R.I. Nov. 13, 1985) (order preliminarily enjoining defendants from making release of nonexempt records), motion to dismiss denied, 639 F. Supp. 1193 (D.R.I. 1986); K. Davis, Administrative Law Treatise § 5:25 (2d ed. 1978 & Supp. 1989). But see Washington Post Co. v. United States Dep't of State, 685 F.2d 698, 700, 704 (D.C. Cir. 1982), vacated & remanded, 464 U.S. 979 (1983).

[15] See, e.g., O'Rourke v. United States Dep't of Justice, 684 F. Supp. 716, 719 (D.D.C. 1988) (finding insufficient basis for denying access on such equitable grounds); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 445 F. Supp. 699, 705-06 (S.D.N.Y. 1978) (denial based on equitable discretion), aff'd on other grounds, 587 F.2d 544, 546 (2d Cir. 1978) (equitable discretion accepted in principle).

The venue provision of the FOIA, quoted above, provides requesters with a broad choice of forums in which to bring suit. The United States District Court for the District of Columbia has over the years decided a great many of the leading cases under the FOIA, largely as the result of its designation as an appropriate forum for any FOIA action against a federal agency under 5 U.S.C. § 552(a)(4)(B). Indeed, the District of Columbia has been held to be the sole appropriate forum for cases in which the requester resides and works outside the United States and the records requested are located in the District of Columbia.[16] It is not yet settled, however, whether this provision affords "personal jurisdiction" in that judicial district for FOIA suits brought against the Tennessee Valley Authority, a wholly owned federal corporation outside the court's normal extraterritorial service of process.[17] It should also be noted that, unlike under other federal venue provisions, aliens are treated the same as citizens for FOIA venue purposes.[18]

The judicial doctrine of forum non conveniens--as codified in 28 U.S.C. § 1404(a)--can permit the transfer of a FOIA case to a different judicial district. The courts have invoked this doctrine to transfer FOIA cases under a variety of circumstances.[19] Similarly, where the requested records are the subject of

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[16] See Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988).

[17] Compare Jones v. NRC, 654 F. Supp. 130, 132 (D.D.C. 1987) (no) with Murphy v. TVA, 559 F. Supp. 58, 59 (D.D.C. 1983) (yes).

[18] See Arevalo-Franco v. INS, 889 F.2d 589, 590-91 (5th Cir. 1989) (alien may bring FOIA suit in district where he in fact resides).

[19] See, e.g., Bauer v. United States, No. Civ. 91-374A, slip op. at 3 (W.D.N.Y. Feb. 3, 1992) (venue improper where pro se suit filed; action transferred to jurisdiction where records located); Housley v. United States Dep't of Justice, No. 89-436, slip op. at 3-4 (D.D.C. Nov. 13, 1989) (transfer to district where criminal proceeding against plaintiff was held and where evidence obtained by government's electronic surveillance allegedly was improperly withheld); Sims v. United States Dep't of Justice, No. 86-231, slip op. at 1 (D.D.C. Apr. 22, 1986) (transfer to district where documents are located, near where plaintiff resides, when "[n]one of the matters at issue . . . have any connection with the District of Columbia"); General Dynamics Corp. v. Department of the Army, No. 85-3901, slip op. at 2 (D.D.C. Jan. 10, 1986) (transfer to district where there are pending criminal charges relating generally to subject matter of requested documents); Mobil Corp. v. SEC, 550 F. Supp. 67, 70-71 (S.D.N.Y. 1982) (sua sponte transfer to district where the 7,000 documents at issue were located and where related litigation was pending); Ferri v. United States Dep't of Justice, 441 F. Supp. 404, 406-07 (M.D. Pa. 1977) (sua sponte transfer because records sought were located in District of Columbia, all administrative action on request was taken there, and plaintiff's only nexus with transferring forum was his incarceration there); see also Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 (2d Cir. 1979) (expressing dissatisfaction with plaintiff's decision to lay venue for FOIA action in Southern District of New York where related, highly complex review of substantive OSHA rule was pending in

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pending FOIA litigation in another judicial district, the related doctrine of "federal comity" can permit a court to defer to the jurisdiction of the other court, in order to avoid unnecessarily burdening the federal judiciary and delivering conflicting FOIA judgments.[20]

On rare occasions, FOIA plaintiffs have attempted to expedite judicial consideration of their suits by seeking a preliminary injunction to "enjoin" the agency from continuing to withhold the requested records.[21] When such extraordinary relief is sought, the court does not adjudicate the parties' substantive claims, but rather weighs: (1) whether the plaintiff is likely to prevail upon the merits; (2) whether the plaintiff will be irreparably harmed absent relief; (3) whether the defendant will be substantially harmed by the issuance of injunctive relief; and (4) whether the public interest will be benefited by such relief.[22]

In a FOIA case, the granting of such an injunction would invariably force the government to irrevocably disclose the very information that is the subject of the litigation prematurely, without affording it any opportunity to fully and fairly litigate its position on the merits; such an injunction would moot the government's claims before they could ever be adjudicated and would effectively

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[19](...continued)
District of Columbia; suggesting transfers or stays on court's own motion if such cases arise in future). But see In re Scott, 709 F.2d 717, 721-22 (D.C. Cir. 1983) (writ of mandamus issued and case remanded where district court sua sponte transferred case, without determination of whether venue was proper in other forum, merely in effort to reduce burden of "very large number of in forma pauperis cases").

[20] See, e.g., Atkin v. EEOC, No. 92-1061, slip op. at 2 (D.D.C. July 7, 1992); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 11-12 (D.D.C. Jan. 31, 1991), summary affirmance granted in relevant part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); see also FOIA Update, Summer 1985, at 6 ("[G]iving a litigant more than one opportunity in court is a 'luxury that cannot be afforded.'") (quoting C. Wright, Law of Federal Courts 678 (4th ed. 1983)).

[21] See United States Dep't of Commerce v. Assembly of Cal., 112 S. Ct. 19 (1991) (staying preliminary injunction issued in No. Civ. S-91-0990 (E.D. Cal. Aug. 20, 1991)); Aronson v. HUD, 869 F.2d 646, 648 (1st Cir. 1989); Assassination Archives & Research Ctr., Inc. v. CIA, No. 88-2600, slip op. at 1 (D.D.C. Sept. 29, 1988), summary reversal denied, No. 88-5315 (D.C. Cir. Oct. 13, 1988).

[22] Nation Magazine v. United States Dep't of State, 805 F. Supp. 68, 72 (D.D.C. 1992); see Assassination Archives & Research Ctr., Inc. v. CIA, slip op. at 1; accord Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (non-FOIA case); see also Mayo v. United States Gov't Printing Office, No. C-92-1922, slip op. at 4-5 (N.D. Cal. June 16, 1992) (fact that FOIA expressly authorizes injunctive relief does not divest district court of obligation to "exercise its sound discretion," relying on traditional legal standards, in granting such relief (citing Weinberger v. Romero Barcelo, 456 U.S. 305, 312 (1982))).

destroy any possibility of appellate review.[23] Consequently, the government would presumptively sustain irreparable harm in any instance in which a preliminary injunction were issued in a FOIA case.[24]

Moreover, because a court can exercise FOIA jurisdiction only after it has first determined that there has been an improper withholding, there exists a substantial question as to whether the statute even empowers a court to issue a preliminary injunction.[25] These considerations lead to the conclusion that the extraordinary mechanism of preliminary injunctive relief should be unavailable in FOIA cases, although expedited processing may sometimes be appropriate. (See discussion of expedited processing under "Open America" Stays, below.)

As a final jurisdictional point, it should be remembered that a FOIA plaintiff, like any other, must file suit before expiration of the applicable statute of limitations. In Spannaus v. Department of Justice, the D.C. Circuit applied the general federal statute of limitations, 28 U.S.C. § 2401(a) (1988), to FOIA actions.[26] Section 2401(a) states, in pertinent part, that "every action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In Spannaus it was held that the FOIA cause of action accrued--and, therefore, the statute of limitations began to run--once the plaintiff had "constructively" exhausted his administrative remedies (see discussion of Exhaustion of Administrative Remedies, below) and not when all administrative appeals had been finally adjudicated.[27] In accordance with the Spannaus decision, the National Archives and Records Administration propounded NARA Bulletin No. 87-6 (Apr. 6, 1987), which now sets the record-retention period at six years for all correspondence and supporting documentation relating to denied FOIA requests.[28]

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[23] See Aronson v. HUD, 869 F.2d at 648 ("To issue the preliminary injunction discloses the names, permanently injuring the interest HUD seeks to protect . . . .").

[24] See generally FOIA Update, Summer 1991, at 1-2 (discussing comparable situation of unstayed disclosure orders).

[25] Cf. Kissinger v. Reporters Comm. for Freedom of the Press, 455 U.S. at 150 (absent improper withholding, FOIA confers no "[j]udicial authority to devise remedies and enjoin agencies"); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 147-48 (1975) (once it is determined that withheld information falls within one of FOIA's exemptions FOIA "'does not apply' to such documents").

[26] 824 F.2d 52, 55-56 (D.C. Cir. 1987).

[27] Id. at 57-59; see Peck v. CIA, 787 F. Supp. 63, 65-66 (S.D.N.Y. 1992) (once ten-day constructive exhaustion period has run, statute of limitations is not tolled while request for information is pending before agency).

[28] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 28 n.51 (Dec. 1987) (agencies should be sure to maintain any "excluded" records for purposes of possible further review) (citing FOIA Update, Fall 1984, at 4 (same regarding "personal" records)); see also

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LITIGATION CONSIDERATIONS

Pleadings

The agency's time to answer a FOIA complaint is 30 days from the date of service of process,[29] not the usual 60 days that are permitted by Federal Rule of Civil Procedure 12(a). While courts are no longer required to automatically accord expedited treatment to FOIA lawsuits, they may still, in their discretion, expedite any such case "if good cause therefor is shown."[30]

FOIA lawsuits are adjudicated according to standards and procedures that are quite atypical within the field of administrative law. Not only is the usual "substantial evidence" standard of review of agency action replaced in the FOIA by a de novo review standard, but the defendant agency bears the burden of justifying its decision to withhold any information.[31] (Lawsuits brought ostensibly under the FOIA may be summarily dismissed, pursuant to 28 U.S.C. § 1915(d), where "[r]eview of the complaint, and its supplements and amendments, show that [the] suit is utterly frivolous, vexatious, and malicious."[32])

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[28](...continued)
Cal-Almond, Inc. v. United States Dep't of Agric., slip op. at 2-3 (where agency returned requested records to submitter in violation of its own records-retention requirements, and court determined such records were required to be disclosed, agency must seek return of records from submitter for disclosure to requester).

[29] 5 U.S.C. § 552(a)(4)(C) (1988).

[30] 28 U.S.C. § 1657 (1988) (repealing 5 U.S.C. § 552(a)(4)(D) (1982)); see also FOIA Update, Spring 1985, at 6.

[31] 5 U.S.C. § 552(a)(4)(B); see also King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 315 (D.C. Cir. 1988); Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); cf. Trenerry v. United States Dep't of Treasury, No. 92-5052, slip op. at 9-10 (10th Cir. Feb. 5, 1993) (although district court used phrase "arbitrary and capricious" in discussing scope of review, its decision will be upheld where "reviewing the entire order clearly reveals that the court performed a de novo review and correctly placed the burden on IRS").

[32] Chambers v. Carlson, No. 87-0390, slip op. at 2 (D.D.C. June 16, 1987); see, e.g., Butler v. Marshall, No. 92-16955, slip op. at 1-2 (9th Cir. May 25, 1993) (district court properly dismissed, as frivolous, in forma pauperis complaint before service of process where plaintiff sought to sue state agency under federal FOIA); McCloud v. Meese, No. 87-3011, slip op. at 2 (6th Cir. Sept. 30, 1987) (suit dismissed as frivolous when plaintiff failed to amend complaint to allege which records were improperly withheld); Franklin v. Oregon, 563 F. Supp. 1310, 1331 (D. Or. 1983) (suit dismissed as frivolous where plaintiff failed to explain how state officials could have violated FOIA); cf. United States v. Kaun, 827 F.2d 1144, 1152-53 (7th Cir. 1987) (frivolous FOIA suits not constitutionally protected, so injunction against filing one not overbroad); Crooker v. Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C.
(continued...)

Where Exemption 1 is invoked, most courts have applied a somewhat lesser standard of review for classified documents in order not to compromise national security. (See discussion of Exemption 1, above.) With respect to FOIA issues other than those involving the propriety of agency withholding of records, one circuit court has applied the de novo standard of review in a lawsuit dealing with an alleged violation of subsection (a)(1) of the FOIA, 5 U.S.C. § 552(a)(1).[33]

A major exception to the de novo standard of review are "reverse" FOIA lawsuits, in which the more deferential "arbitrary and capricious" standard is applied. (See discussion of "Reverse" FOIA, below.) Judicial review of fee waiver denials was undertaken according to the "arbitrary and capricious" standard prior to the 1986 FOIA amendments, which now mandate that courts are to determine fee waiver issues under the de novo standard of review, but are to limit their scope of review to the record before the agency. (See discussion of Fees and Fee Waivers, above.)

There is a sound general rule that only federal agencies and departments are proper party defendants in FOIA litigation. This rule is derived from the language of 5 U.S.C. § 552(a)(4)(B), which vests the district courts with jurisdiction to enjoin "the agency" from withholding records.[34] The great majority of courts have held that the head of an agency or other agency officials or employees sued in their official capacities are not proper party defendants under the FOIA.[35] A minority of courts, however, has disagreed with this posi-

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[32](...continued)
1986) (given "plethora" of FOIA suits filed by plaintiff and fact that plaintiff fails routinely to oppose motions to dismiss, plaintiff's "litigation efforts have been for purposes of harassment"; plaintiff ordered to attach a memorandum to any subsequent lawsuit explaining why that suit is not barred by res judicata).

[33] See Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1011 (9th Cir. 1987).

[34] See, e.g., Voinche v. United States Dep't of Justice, No. 87-4781, slip op. at 1-2 (5th Cir. Feb. 4, 1988) (no basis for suit against state governor, private citizen or telephone company), cert. denied, 486 U.S. 1040 (1988); Maxberry v. Eastern Plasma, No. 87-3022, slip op. at 3 (6th Cir. Aug. 11, 1987) (private institutions not proper party defendants); Espenshade v. Carbone, No. 86-2610, slip op. at 2-3 (D.D.C. May 15, 1987) (no proper party defendant where plaintiff sued individuals, Pennsylvania State University and the United States, without naming agency that allegedly withheld records improperly); Gillard v. United States Marshals Serv., No. 87-689, slip op. at 1-2 (D.D.C. May 11, 1987) (District of Columbia not proper party defendant under federal FOIA).

[35] See, e.g., Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993); Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 785 (D.D.C. 1993) (appeal pending); Sherwood Van Lines v. United States Dep't of the Navy, 732 F. Supp. 240, 241 (D.D.C. 1990); Friedman v. FBI, 605 F. Supp. 314, 317 (N.D. Ga. 1984);
(continued...)

tion.[36] It also has been observed that the "United States," as such, is not a proper party defendant in a FOIA case.[37]

It is clear that an agency in possession of records originating with another agency cannot refuse to process those records merely by advising the requester to seek them directly from the other agency.[38] In litigation, the defendant agency ordinarily will include, in its court submissions, affidavits from the originating agency to address any contested withholdings in its records.[39] (For a further discussion of agency referral practices, see Procedural Requirements, above.)

Exhaustion of Administrative Remedies

The general rule under the FOIA is that administrative remedies must be exhausted prior to judicial review.[40] Indeed, where a FOIA plaintiff attempts to obtain judicial review without first properly undertaking full and timely administrative exhaustion, his lawsuit is subject to ready dismissal for lack of

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[35](...continued)
Providence Journal Co. v. FBI, 460 F. Supp. 778, 782-83 & n.2 (D.R.I. 1978) rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

[36] See, e.g., Henry v. FBI, No. 90-1987, slip op. at 5-6 (W.D. La. Oct. 7, 1991); Diamond v. FBI, 532 F. Supp. 216, 219-20 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); Hamlin v. Kelley, 433 F. Supp. 180, 181 (N.D. Ill. 1977).

[37] See Maginn v. United States, No. 92-313, slip op. at 7 (W.D. Pa. May 29, 1992); Western Life Ins. Co. v. United States, 512 F. Supp. 454, 463 (N.D. Tex. 1980).

[38] See Ostrer v. Department of Justice, No. 85-506, slip op. at 7-8 (D.D.C. Feb. 7, 1986), amended, slip op. at 2-3 (D.D.C. Apr. 9, 1986).

[39] See, e.g., Williams v. FBI, No. 92-5176, slip op. at 2 (D.C. Cir. May 7, 1993); Oglesby v. United States Dep't of the Army, 920 F.2d 57, 69 & n.15 (D.C. Cir. 1990); Fitzgibbon v. CIA, 911 F.2d 755, 757 (D.C. Cir. 1990); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 706-07 & n.1 (W.D.N.Y. 1991); see also FOIA Update, Summer 1991, at 3-4 ("OIP Guidance: Referral and Consultation Procedures").

[40] Oglesby v. United States Dep't of the Army, 920 F.2d 57, 61-62 (D.C. Cir. 1990); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990); Spannaus v. United States Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987); Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985); Tuchinsky v. Selective Serv. Sys., 418 F.2d 155, 158 (7th Cir. 1969); Gale v. United States Gov't, 786 F. Supp. 697, 699 (N.D. Ill. 1990).

subject matter jurisdiction.[41] It is self-evident that a plaintiff cannot evade proper FOIA procedures by attempting to file his FOIA request as part of a judicial proceeding.[42] (For a further discussion of the proper submission of requests, see Procedural Requirements, above.)

It is important to recognize, though, that the FOIA permits requesters to treat an agency's failure to comply with its specific time limits as full, or "constructive," exhaustion of administrative remedies.[43] Thus, when an agency does not respond to a perfected request within the ten-day statutory time limitation set forth in 5 U.S.C. § 552(a)(6)(A)(i), the requester is deemed to have exhausted administrative remedies and can seek immediate judicial review, even where the requester has not filed an administrative appeal.[44] Interestingly, the

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[41] See, e.g., Dettman v. United States Dep't of Justice, 802 F.2d 1472, 1477 (D.C. Cir. 1986); Hymen v. MSPB, 799 F.2d 1421, 1423 (9th Cir. 1986); Brumley v. United States Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 790 (D.D.C. 1992) (although U.S. Attorney's Office aware that information requester sought from FBI included certain U.S. Attorney's Office material, it was under no obligation to independently search its own files for responsive information absent a direct request); Crooker v. United States Secret Serv., 577 F. Supp. 1218, 1219-20 (D.D.C. 1983), appeal dismissed, No. 83-2203 (D.C. Cir. Feb. 21, 1984).

[42] Gillin v. IRS, 980 F.2d 819, 822-23 (1st Cir. 1992) (where "flawed" request was predicated upon a misunderstanding with agency but, within one week after submission, information provided by agency should have prompted requester to revise his request, requester cannot salvage request by clarification in litigation); Pollack v. United States Dep't of Justice, No. 89-2569, slip op. at 8-9 (D. Md. July 23, 1993) (court lacks subject matter jurisdiction where request not submitted until after litigation filed); Centracchio v. FBI, No. 92-357, slip op. at 13 (D.D.C. Mar. 16, 1993); Muhammad v. United States Bureau of Prisons, 789 F. Supp. 449, 450-51 (D.D.C. 1992); see also McDonnell v. United States, No. 91-5916, slip op. at 11 (3d Cir. Sept. 21, 1993) ("[A] person . . . whose names does not appear on a FOIA request for records may not sue in district court when the agency refuses to release requested documents because he has not administratively asserted a right to receive them in the first place.") (to be published). But see Hammie v. Social Sec. Admin., 765 F. Supp. 1224, 1226 (E.D. Pa. 1991) (in considering government's dismissal motion, court is required to accept plaintiff's averments that he submitted requests).

[43] 5 U.S.C. § 552(a)(6)(C) (1988).

[44] See, e.g., Campbell v. Unknown Power Superintendent, No. 91-35104, slip op. at 3 (9th Cir. Apr. 22, 1992); Association of Community Orgs. for Reform Now v. Barclay, No. 3-89-409, slip op. at 4-7 (N.D. Tex. June 9, 1989); Virginia Transformer Corp. v. United States Dep't of Energy, 628 F. Supp. 944, 947 (W.D. Va. 1986); Jenks v. United States Marshals Serv., 514 F. Supp. 1383, 1384-87 (S.D. Ohio 1981); Information Acquisition Corp. v.

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LITIGATION CONSIDERATIONS

Court of Appeals for the Fifth Circuit has recently held that a lawsuit brought under 5 U.S.C. § 552(a)(6)(e) as a result of the agency's failure to comply with these time limits is properly dismissed for mootness as soon as the agency makes a determination to either disclose or withhold the requested records.[45] The special right to immediate judicial review lapses, however, if an agency responds to a request at any time before suit is filed. In that situation, the requester must administratively appeal a denial and wait at least twenty working days for the agency to adjudicate that appeal--as is required by 5 U.S.C. § 552(a)(6)(A)(ii)--before commencing litigation. This point was made by the Court of Appeals for the District of Columbia Circuit in Oglesby v. United States Department of the Army, which held that "an administrative appeal is mandatory if the agency cures its failure to respond within the statutory [ten-day] period by responding to the FOIA request before suit is filed."[46] Thus, under Oglesby, if a FOIA requester waits beyond the ten-day period for the agency's initial response and then, in fact, receives that response before suing the agency, the requester must exhaust his administrative appeal rights before litigating the matter.[47]

Furthermore, of additional significance under Oglesby is a requester's obligation to file an administrative appeal within the time limit specified in an

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[44](...continued)
Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); see also FOIA Update, Jan. 1983, at 6.

[45] Voinche v. FBI, No. 93-4262, slip op. 6153, 6154 (5th Cir. Sept. 3, 1993) (to be published).

[46] 920 F.2d at 63; see, e.g., Government Employees' Advisors & Representatives, Inc. v. United States Dep't of Labor, No. 4-85-498-K, slip op. at 5-6 (N.D. Tex. Nov. 6, 1986); Walker v. IRS, No. 86-0073, slip op. at 4 (M.D. Pa. June 16, 1986); Caifano v. Parole Comm'n, No. 85-3513, slip op. at 2 (D.D.C. Feb. 26, 1986), dismissed (D.D.C. Sept. 18, 1986). But see generally Manos v. United States Dep't of the Air Force, No. C-92-3986, slip op. at 10-12 (N.D. Cal. Feb. 10, 1993) (exceptional decision holding that period for agency response determined by date response actually received by requester, not date response mailed by agency).

[47] 920 F.2d at 63-64; see, e.g., McDonnell v. United States, slip op. at 18-19 (applying Oglesby); Sloman v. United States Dep't of Justice, No. 92 Civ. 4982, slip op. at 6-8 (S.D.N.Y. May 4, 1993) (same); Triplett v. Attorney General, No. C-2-92-211, slip op. at 13-14 (S.D. Ohio Feb. 22, 1993) (same); Maryland Coalition for Integrated Educ., Inc. v. United States Dep't of Educ., No. 89-2851, slip op. at 7-8 (D.D.C. July 20, 1992) (same) (appeal pending); Gassei v. United States Dep't of Justice, No. 91-1031, slip op. at 1 (W.D. Okla. Nov. 22, 1991) (same); Grove v. CIA, 752 F. Supp. 28, 31 (D.D.C. 1990) (same); see also FOIA Update, Spring 1991, at 3-5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision").

agency's FOIA regulations.[48] Indeed, even prior to Oglesby, several courts had held that once a requester receives an initial response, he must file an appeal within any applicable time limit, or else his lawsuit is subject to dismissal for failure to exhaust administrative remedies.[49]

In any event, it must be remembered that an agency response which merely acknowledges receipt of a request does not constitute a "determination" under the FOIA in that it neither denies records nor grants the right to appeal the agency's determination.[50] Significantly, the ten-day time period does not run until the request is received by the appropriate office in the agency, as set forth in the agency's regulations.[51] In fact, when an agency has regulations requiring that requests be made to specific offices for specific records, a request will not be deemed received--and no search for responsive records need be performed--if the requester does not follow those regulations.[52] Additionally, even where a requester has "constructively" exhausted his administrative remedies by the agency's failure to respond determinatively to the request within the statutory time limits, the requester is not entitled to a Vaughn Index during the administrative process.[53]

Even if the agency has exceeded its ten-day time limit for the processing of initial responses to a request, its twenty-day time limit for the processing of administrative appeals, or its ten-day extension of either time limit,[54] requesters have been deemed not to have constructively exhausted administrative remedies where they have failed to comply with agency requisites--for example,

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[48] See, e.g., 920 F.2d at 65 & n.9 (citing regulations of agencies involved in Oglesby); Lanter v. Department of Justice, No. 93-34, slip op. at 2 (W.D. Okla. July 30, 1993) (court compelled to dismiss FOIA claim when plaintiff's administrative appeal from agency's response not filed in timely manner); see also FOIA Update, Spring 1991, at 4-5.

[49] See, e.g., Lindsey v. NSA, No. 90-2408, slip op. at 3 (4th Cir. Oct. 9, 1990); Tripati v. United States Dep't of Justice, No. 87-3301, slip op. at 2 (D.D.C. Apr. 15, 1988).

[50] See Martinez v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,005, at 83,435 (D.D.C. Dec. 1, 1982); FOIA Update, Summer 1992, at 5; see also Brumley v. United States Dep't of Labor, 767 F.2d at 445; cf. Dickstein v. IRS, 635 F. Supp. 1004, 1006 (D. Alaska 1986) (letter referring requester to alternative "procedures which involved less red tape and bureaucratic hassle" not deemed to be denial).

[51] Brumley v. United States Dep't of Labor, 767 F.2d at 445.

[52] See Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986); Hahn v. IRS, No. CA3-89-3254-D, slip op. at 2-3 (N.D. Tex. Aug. 24, 1990).

[53] See SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 3-5 (D.D.C. Apr. 21, 1986); Schaake v. IRS, No. 91-958, slip op. at 7-8 (S.D. Ill. June 3, 1992); see also FOIA Update, Summer 1986, at 6.

[54] See 5 U.S.C. § 552(a)(6).

failed to provide required proof of identity[55] in first-party requests[56] or authorization by third parties,[57] failed to "reasonably describe" the records sought,[58] failed to comply with fee requirements,[59] failed to pay authorized fees incurred in a prior request before making new requests,[60] failed to present for review at the administrative appeal level any objection to earlier processing

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[55] See Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that authorization for release of records need not be notarized, but can be attested to under penalty of perjury pursuant to 28 U.S.C. § 1746).

[56] See, e.g., Lilienthal v. Parks, 574 F. Supp. 14, 17-18 (E.D. Ark. 1983).

[57] Freedom Magazine v. IRS, No. CV-91-4536, slip op. at 7-10 (C.D. Cal. Nov. 13, 1992) (court lacked jurisdiction where, prior to filing suit, plaintiff failed to provide waivers for third-party records as required by IRS regulations). But see LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 15 (D.D.C. June 24, 1993) (although third-party waivers not submitted during administrative process, "they present solely legal issues which can properly be resolved by [the] Court").

[58] See, e.g., Gillin v. IRS, 980 F.2d at 822-23 (where defective request was predicated upon misunderstanding with agency, but within one week after submission, information provided by agency should have prompted requester to revise his request; request does not "reasonably describe" records actually sought); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); see also Voinche v. United States Dep't of the Air Force, 983 F.2d 667, 669 n.5 (5th Cir. 1993) (administrative remedies on fee waiver not exhausted where requester failed to amend request to conform to specificity required by agency regulations), petition for cert. filed, 61 U.S.L.W. 3820 (U.S. May 17, 1993).

[59] See, e.g., Kuchta v. Harris, No. 92-1121, slip op. at 5-9 (D. Md. Mar. 25, 1993) (failure to either pay fees or request fee waiver halts administrative process and precludes exhaustion); Centracchio v. FBI, slip op. at 5 ("Plaintiff's failure to pay the deposit or request a waiver is fatal to his claim and requires dismissal . . . ."); Atkin v. EEOC, No. 91-2508, slip op. at 21-22 (D.N.J. Dec. 4, 1992) ("exhaustion does not occur where the requester has failed to pay the assessed fees, even though the agency failed to timely process a request") (appeal pending); Martorano v. FBI, No. 89-377, slip op. at 8 (D.D.C. Sept. 30, 1991) (plaintiff failed to either pay processing fees or provide information supporting fee waiver); Morello v. United States Dep't of Justice, No. 90-1078, slip op. at 4-5 (D.D.C. Oct. 16, 1990), aff'd, 948 F.2d 1337 (D.C. Cir. 1991) (table cite); Crooker v. CIA, 577 F. Supp. 1225, 1225 (D.D.C. 1984); see also Atkin v. EEOC, slip op. at 8-9 ("the fact that Atkin paid his fees after he instituted this action does not confer jurisdiction").

[60] See, e.g., Crooker v. United States Secret Serv., 577 F. Supp. at 1219-20; Mahler v. Department of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,032, at 82,262 (D.D.C. Sept. 29, 1981).

practices,[61] or failed to administratively request a waiver of fees[62] or to challenge a fee waiver denial at the administrative appeal stage.[63]

"Open America" Stays

Even when a requester has constructively exhausted administrative remedies, due to an agency's failure to comply with the FOIA's time deadlines, the Act provides that a court may retain jurisdiction and allow the agency additional time to complete its processing of the request if it can be shown that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."[64]

The leading case construing this important "safety valve" provision of the FOIA is Open America v. Watergate Special Prosecution Force.[65] In Open America, the Court of Appeals for the District of Columbia Circuit held that "exceptional circumstances" may exist when an agency can show that it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."[66] The D.C. Circuit further ruled that the "due diligence" requirement may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis, and that a requester's right to have his request processed out of turn requires a particularized showing of "exceptional need or urgency."[67] In so ruling, the D.C. Circuit rejected the notion that the mere filing of a lawsuit was a basis for such expedited treatment.[68]

Where Open America's requirements are met, an agency can apply for a stay of judicial proceedings to obtain whatever additional time is necessary to complete the administrative processing of the request.[69] In considering such

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[61] See, e.g., Dettman v. United States Dep't of Justice, 802 F.2d at 1477.

[62] Voinche v. United States Dep't of the Air Force, 983 F.2d at 669.

[63] See, e.g., Crooker v. CIA, No. 86-3055, slip op. at 4-5 (D.D.C. May 10, 1988).

[64] 5 U.S.C. § 552(a)(6)(C) (1988).

[65] 547 F.2d 605 (D.C. Cir. 1976).

[66] Id. at 616.

[67] Id.

[68] Id. at 615. But see Exner v. FBI, 542 F.2d 1121, 1123 (9th Cir. 1976) (adopting Judge Leventhal's concurring opinion in Open America and holding that filing of suit can move requester "up the line").

[69] See, e.g., Billington v. United States Dep't of Justice, No. 92-462, slip op. at 2-3 (D.D.C. July 27, 1992) (circumstances justify nearly three-year stay from date of order); Samuel Gruber Educ. Project v. United States Dep't of

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applications, most courts have found "exceptional circumstances" where the agency is unable to meet the FOIA's time deadlines due to increased backlogs of requests and inadequate resources to handle them, and have found "due diligence" where the agency acts in good faith to process requests on a "first in/first out" basis.[70] Nevertheless, in Mayock v. INS,[71] a district court ruled that Open America's requisites were not satisfied when processing delays resulted from a "normal" backlog of routine requests.[72] Significantly, though, the

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[69](...continued)
Justice, No. 90-1912, slip op. at 6 (D.D.C. Feb. 8, 1991) (circumstances justify 22-month stay from date of order); Lisee v. CIA, 741 F. Supp. 988, 989-90 (D.D.C. 1990) (circumstances justify 26-month stay from date of order); Summers v. United States Dep't of Justice, 729 F. Supp. 1379, 1379 (D.D.C. 1989) (circumstances justify 22-month stay from date of order); Benny v. United States Dep't of Justice, No. 86-1172, slip op. at 4-6 (D.D.C. Oct. 21, 1986) (circumstances justify 12-month stay from date of order); Ely v. Executive Office for U.S. Attorneys, No. 84-2962, slip op. at 1 (D.D.C. Dec. 21, 1984) (24-month stay from date of FOIA request granted).

[70] See, e.g., Williamson v. INS, No. H-89-3421, slip op. at 2-3 (S.D. Tex. Apr. 11, 1991), aff'd per curiam, No. 91-2526, slip op. at 2 (5th Cir. May 4, 1992) (due diligence employed in "responding to the seemingly limitless number of FOIA requests on a first in/first out basis") (dicta); Freeman v. United States Dep't of Justice, 822 F. Supp. 1064, 1967 (S.D.N.Y. 1993) ("Defendant has established that it faces exceptional circumstances in that it has a substantial backlog even though it processes requests as quickly as possible within its financial ability."); Russell v. Barr, No. 92-2546, slip op. at 1-2 (D.D.C. Mar. 5, 1993); Wisconsin Project on Nuclear Arms Control v. United States Dep't of Energy, No. 90-1432, slip op. at 2-5 (D.D.C. Dec. 18, 1990); see generally FOIA Update, Spring 1992, at 8-10; FOIA Update, Winter 1990, at 1-2. But see Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 1-2 (D.D.C. Aug. 11, 1987) (further stays denied because agency failed to process records during one year since previous court deadline and failed to give reason for delay); Ely v. United States Marshals Serv., No. 83-C-569-S, slip op. at 2 (W.D. Wis. Oct. 31, 1983) (stay denied because length of agency backlog had not improved in six years); cf. Gilmore v. NSA, No. C-92-3646, slip op. at 20 (N.D. Cal. Sept. 13, 1993) (declining to exercise jurisdiction because "[g]iven the substantial number of FOIA requests that the NSA receives and the short deadline that FOIA imposes, the only way in which the NSA could consistently meet the deadlines would be if it vastly expanded the resources it devotes to responding to FOIA requests"); Caifano v. Wampler, 588 F. Supp. 1392, 1394-95 (N.D. Ill. 1984) (expressing concern that when agency is exercising due diligence no relief can be given for violation of 10-day response period; cannot order agency to reallocate resources; will not permit filing of suit to jump requester to "front of line").

[71] 714 F. Supp. 1558 (N.D. Cal. 1989), rev'd & remanded sub nom. Mayock v. Nelson, 938 F.2d 1066 (9th Cir. 1991).

[72] 714 F. Supp. at 1565-66; accord Ray v. United States Dep't of Justice, No. 89-288, slip op. at 11-12 (S.D. Fla. Dec. 27, 1990).

Court of Appeals for the Ninth Circuit subsequently reversed and remanded Mayock, finding that it was unclear whether the district court had considered agency evidence that it had attempted to get increased funding to reduce its backlog.[73]

It should be remembered that an "Open America" stay may be denied where the requester can show an "exceptional need or urgency" for having his request processed out of turn.[74] Such a showing has been made in cases where the requester's life or personal safety, or substantial due process rights, would be jeopardized by the failure to process a request immediately.[75] Absent truly exceptional circumstances, though, most courts have declined to order expedited processing where records are "needed" for post-judgment attacks on

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[73] 938 F.2d at 1007-08; see also Narducci v. United States Dep't of Justice, No. 91-2972, slip op. at 2 (D.D.C. June 16, 1992) (government's motion to dismiss denied when year had passed since request was made, it did not appear that request would be processed in near future, and FBI had not indicated that it had attempted to reduce its large backlog by proposing legislation or requesting additional staff); Rosenfeld v. United States Dep't of Justice, No. C-90-3576, slip op. at 8-13 (N.D. Cal. Feb. 18, 1992) ("exceptional circumstances" justifying processing stay not present where, despite substantial backlog, FBI made no significant effort to increase resources to satisfy FOIA obligations; nonetheless, FBI given one year to complete processing of 220,000 pages of records).

[74] Open America, 547 F.2d at 616.

[75] See, e.g., Ferguson v. FBI, 722 F. Supp. 1137, 1141-44 (S.D.N.Y. 1989) (need for documents, not otherwise available, in post-conviction challenge and upcoming criminal trial); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff facing multiple criminal charges carrying possible death penalty in state court); Boult v. Department of Justice, No. C76-1217A, slip op. at 3-4 (N.D. Ga. Oct. 22, 1976) (pending deportation that could endanger requester's physical safety); see also Florida Rural Legal Servs. v. United States Dep't of Justice, No. 87-1264, slip op. at 3-4 (S.D. Fla. Feb. 10, 1988) (processing priority granted to nonprofit organization needing list of undocumented aliens in order to assist them in making timely applications for legalization); FOIA Update, Summer 1983, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); Compare Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (expedited processing granted where scope of request limited, "Jenks Act" type material unavailable in state prosecution, and information useful to plaintiff's criminal defense may be contained in requested documents) with Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 11-12 (D.D.C. June 28, 1993) (denying further expedited treatment where processing "would require a hand search of approximately 50,000 pages, taking approximately 120 days"). But see Billington v. United States Dep't of Justice, No. 92-462, slip op. at 3-5 (D.D.C. July 27, 1992) (expedited treatment denied despite pendency of prosecutions, where requester had not shown any likelihood that files contain "materially exculpatory information").

criminal convictions,[76] or for use in other civil litigation.[77] In addition, it has been held firmly that publishing deadlines are not sufficient grounds for expedited processing.[78] (For a further discussion of expedited processing, see Procedural Requirements, above.)

Where there is a large volume of responsive documents that have not been processed, instead of granting an unconditional Open America stay to the agency until all initial processing has been completed, a court may grant a stay that provides for interim or "timed" releases.[79]

Finally, an "Open America" stay should, where necessary, include the time required for preparation of a Vaughn Index.[80] While the Open America decision does not directly address the additional time needed by an agency to

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[76] See, e.g., Russell v. Barr, slip op. at 2 ("[p]laintiff's claim that the requested information may 'minister [his] defense in the civil proceeding and motion for a new trial' in his criminal proceeding" inadequate to justify expedition); Thompson v. FBI, No. 90-3020, slip op. at 3 (D.D.C. July 8, 1991); Shilling v. Bureau of Alcohol, Tobacco & Firearms, No. 90-1422, slip op. at 3 (D.D.C. Dec. 3, 1990); Crabtree v. United States Dep't of Justice, No. 88-0861, slip op. at 5 (D.D.C. Aug. 26, 1988); Antonelli v. FBI, No. 84-1047, slip op. at 2-3 (D.D.C. Nov. 13, 1984); Gonzalez v. DEA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,016, at 81,069 (D.D.C. Nov. 20, 1980).

[77] See, e.g., Price v. CIA, No. 90-1507, slip op. at 2 (4th Cir. Oct. 2, 1990); Steffen v. United States Dep't of Justice, No. 89-3434, slip op. at 3 (D.D.C. July 12, 1990); Benny v. United States Dep't of Justice, slip op. at 5; Grandison v. DEA, No. 81-1001, slip op. at 2 (D.D.C. July 9, 1981); cf. Armstrong v. Bush, 807 F. Supp. 816, 819 (D.D.C. 1992) (priority afforded to additional FOIA requests added to those already subject of litigation, where responsive records might otherwise be destroyed).

[78] See, e.g., Freeman v. United States Dep't of Justice, 822 F. Supp. 1064, 1067 (S.D.N.Y. 1993) ("Plaintiff's desire to inform the public [through publication and submission to a Congressional committee], while commendable, does not constitute an exceptional need. Since almost every request can be linked to such a desire, granting expedited treatment for that purpose would allow the exception to swallow the rule."); Nation Magazine v. United States Dep't of State, 805 F. Supp. 64, 73 (D.D.C. 1992) ("[T]here are numerous reasons why this Court should not broaden the definition of 'exceptional need or urgency' to include FOIA requests concerning Presidential candidates pending weeks before an election."); Lisee v. CIA, 741 F. Supp. 988, 989 (D.D.C. 1990); Summers v. United States Dep't of Justice, 733 F. Supp. 443, 444 (D.D.C. 1990), appeal dismissed on procedural grounds, 925 F.2d 450 (D.C. Cir. 1991); Summers v. United States Dep't of Justice, 729 F. Supp. 1379, 1379 (D.D.C. 1989); Mangold v. CIA, No. 88-1826, slip op. at 6-7 (D.D.C. May 3, 1989).

[79] See, e.g., Samuel Gruber Educ. Project v. United States Dep't of Justice, slip op. at 6 (71,000 pages of documents); Hinton v. FBI, 527 F. Supp. 223, 223-25 (E.D. Pa. 1981) (21,000 pages of documents).

[80] See FOIA Update, Fall 1988, at 5.

justify nondisclosure of any withheld records once they are processed, courts have, as a practical matter, tended to merge the record-processing and the affidavit-preparation stages when issuing stays of proceedings under Open America.[81]

Adequacy of Search

In many suits under the FOIA, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the manner in which, and extent to which, it has endeavored to locate responsive documents. (For a discussion of administrative considerations in conducting searches, see Procedural Requirements, above.) To prevail in a FOIA action, the agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements."[82] Thus, the agency is under a duty to conduct a "reasonable" search for responsive records.[83]

Courts generally evaluate a search's reasonableness by reviewing the agency's retrieval efforts in light of the parameters specified in the FOIA request.[84] Although the adequacy of a search is "dependent upon the circum-

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[81] See, e.g., Lisee v. CIA, 741 F. Supp. at 989-90 ("Open America" stay granted for both processing records and preparing Vaughn Index); Ettlinger v. FBI, 596 F. Supp. 867, 878-79 (D. Mass. 1984) (same); Shaw v. Department of State, 1 Gov't Disclosure Serv. (P-H) ¶ 80,250, at 80,630 (D.D.C. July 31, 1980) (same).

[82] Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

[83] See, e.g., In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992); Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1352 (D.C. Cir. 1983).

[84] See, e.g., Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986) (where agency regulations require requests be made to specific offices for specific records, no need to search additional offices when those regulations are not followed); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978) (no duty to search FBI field offices where requester directed request only to FBI Headquarters and did not specify which field offices he wanted searched); Church of Scientology Int'l v. IRS, No. 90-2567, slip op. at 5-6 (C.D. Cal. Aug. 2, 1991) (where request plainly limited to IRS national and international offices, IRS under no obligation to search offices other than those specified); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 54 (D.D.C. 1985) ("There is no requirement that an agency search every division or field office in response to a FOIA request, especially where the requester has indicated specific areas where responsive documents might be located . . . ."); Biberman v. FBI, 528 F. Supp. 1140, 1144 (S.D.N.Y. 1982) ("It has frequently been held that a general FOIA request to headquarters does not 'reasonably

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stances of the case,"[85] the agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."[86] In this connection, it is firmly settled that "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate."[87]

A requester's "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable

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[84](...continued)
describe' a search of numerous field offices."); cf. American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (agency's refusal to perform canvass of 356 bureau offices for multitude of files held justified), aff'd, 907 F.2d 203 (D.C. Cir. 1990). But cf. Krikorian v. United States Dep't of State, 984 F.2d 461, 468-69 (D.C. Cir. 1993) (on remand, district court must explain why it was unnecessary for agency to search 11 regional security offices identified in article which formed basis for plaintiff's FOIA request).

[85] Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990); see also Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) ("depends upon the facts of each case").

[86] Oglesby v. Department of the Army, 920 F.2d at 68; See Maynard v. CIA, 986 F.2d at 559; SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991); see also Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978) (production of records not previously segregated required only where material can be identified with reasonable effort), vacated in other part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980); Dettman v. United States Dep't of Justice, No. 82-1108, slip op. at 8 (D.D.C. Mar. 21, 1985) (government expected to operate under "reasonable plan designed to produce the requested documents"), aff'd on other grounds, 802 F.2d 1472 (D.C. Cir. 1986).

[87] Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); see also In re Wade, 969 F.2d at 249 n.11; Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986) ("a search is not unreasonable simply because it fails to produce all relevant material; no search of this [large] size . . . will be free from error"); Miller v. United States Dep't of State, 779 F.2d at 1385 ("[P]laintiff alleges that the search was insufficient because the Department did not do all that it could; we agree . . . , however, that it did all the Act required."); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish."); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 54 (D.D.C. 1990) (paucity of documents produced held to be "of no legal consequence" where search is shown to be reasonable).

search for them."[88] It has been observed that "[n]othing in the law requires the agency to document the fate of documents it cannot find."[89] And when agencies do subsequently locate documents initially believed to have been lost or destroyed, courts have accepted this as evidence of the agency's good-faith efforts.[90]

Additionally, it has been held that the FBI is not required to search beyond its indices in pro se cases where the requester has refused to pay the cost of the search, unless the requester pinpoints a specific file.[91] The FBI's search of its indices has been deemed "reasonable" where it has searched through "main files" (where the subject of the request was the subject of the file) and "cross" or "see references" (where the subject of the request was merely mentioned in a file in which another individual or organization was the subject).[92] It has also been held that, "[b]ecause the scope of a search is limit-

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[88] SafeCard Servs., Inc. v. SEC, 926 F.2d at 1201; see also Oglesby v. Department of the Army, 920 F.2d at 67 n.13 (adequacy of agency's search not undercut by requester's speculative claim that other records "must exist" due to perceived importance of subject matter); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 786 (D.D.C. 1993) (appeal pending); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) ("Plaintiff's incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith.").

[89] Roberts v. United States Dep't of Justice, No. 92-1707, slip op. at 4 (D.D.C. Jan. 28, 1993); see Maynard v. CIA, 986 F.2d at 564 ("'The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.'" (quoting Miller v. United States Dep't of State, 779 F.2d at 1385)).

[90] See Maynard v. CIA, 986 F.2d at 565 ("Rather than bad faith, we think that the forthright disclosure by the INS that it had located the misplaced file suggests good faith on the part of the agency."); Meeropol v. Meese, 790 F.2d at 953; Goland v. CIA, 607 F.2d at 370 (revelation one week following decision by court of appeals that agency had discovered numerous, potentially responsive, additional documents several months earlier, insufficient to undermine validity of agency's prior search); Gilmore v. NSA, No. 92-3646, slip op. at 21-22 (N.D. Cal. Apr. 30, 1993) (acceptance of plaintiff's "'perverse theory that a forthcoming agency is less to be trusted in its allegations than an unyielding agency'" would "'work mischief in the future by creating a disincentive for the agency to reappraise its position'" (quoting Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981))).

[91] See Ely v. FBI, No. 84-1615, slip op. at 2-3 (D.D.C. Jan. 28, 1985). But see Larouche v. Webster, No. 75-6010, slip op. at 10 (S.D.N.Y. Oct. 23, 1984) (FBI must search all specialized files on subject of request about which requester is unlikely to know).

[92] See Beauman v. FBI, No. CV-92-7603, slip op. at 9 (C.D. Cal. Apr. 28, 1993); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 567 n.12 (continued...)

ed by a plaintiff's FOIA request, there is no general requirement that an agency search secondary references or variant spellings."[93]

Similarly, with respect to the processing of "cross" or "see references," only those portions of the file which pertain directly to the subject of the request are considered within the scope of the request.[94] As one court has phrased it, "[t]o require the government to release an entire document where plaintiff's name is only mentioned a few times would be to impose on the government a burdensome and time consuming task."[95] With respect to a document in the requester's file which pertained entirely to a third party, one court has held that "[g]iven the lack of any relation between these pages and [the requester], as well as the minimal information that would remain after redaction, [the agency's] decision not to release these documents was not erroneous."[96]

To prove the adequacy of its search, as in sustaining its claims of exemption, an agency may rely upon affidavits (see the discussion of Vaughn Indexes, below), provided that they are "relatively detailed, nonconclusory, and submitted in good faith."[97] Such affidavits must show "that the search method was

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[92](...continued)
(S.D.N.Y. 1989); Freeman v. United States Dep't of Justice, No. 85-0958A, slip op. at 6 (E.D. Va. Mar. 12, 1986), aff'd, No. 86-1073 (4th Cir. Dec. 29, 1986); Friedman v. FBI, 605 F. Supp. 306, 311 (N.D. Ga. 1981); Stern v. United States Dep't of Justice, No. 77-3812-C, slip op. at 7 (D. Mass. Aug. 25, 1980); see also Maynard v. CIA, 986 F.2d at 562 (Treasury Department properly limited its search to its automated Treasury Enforcement Communications System ("TECS")); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 817-18 (D.N.J. 1993) (indices search by United States Attorney's Office held adequate).

[93] Maynard v. CIA, 986 F.2d at 560.

[94] See Posner v. Department of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,229, at 82,650 (D.D.C. Mar. 9, 1982).

[95] Dettman v. United States Dep't of Justice, slip op. at 5-6; see also Osborne v. United States Dep't of Justice, No. 84-1910, slip op. at 2-3 (D.D.C. Feb. 28, 1985) (DEA search of relevant records systems and case files regarding requester held sufficient); Dunaway v. Webster, 519 F. Supp. 1059, 1083 (N.D. Cal. 1981).

[96] Greenspun v. IRS, No. 84-3426, slip op. at 4 (D.D.C. Sept. 30, 1985).

[97] Pollack v. Bureau of Prisons, 879 F.2d 406, 409 (8th Cir. 1989); see Miller v. United States Dep't of State, 779 F.2d at 1383; Weisberg v. United States Dep't of Justice, 705 F.2d at 1351; Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982) ("affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA"); Goland v. CIA, 607 F.2d at 352; Grove v. United States Dep't of Justice, 802 F. Supp. 506, 518
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reasonably calculated to uncover all relevant documents" and must "identify the terms searched or explain how the search was conducted."[98] It is not necessary that the agency employee who actually performed the search supply an affidavit describing the search; rather, the affidavit of an official responsible for supervising or coordinating the search efforts should be sufficient to fulfill the personal knowledge requirement of Rule 56(e) of the Federal Rules of Civil Procedure.[99] (For a further discussion of this "personal knowledge" requirement, see Summary Judgment, below.)

An inadequate description of the search process, or a description which reveals an inadequate search, will necessitate denial of summary judgment.[100]

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[97](...continued)
(D.D.C. 1992); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 10 (D.D.C. Sept. 29, 1987) (affidavits held to sufficiently describe adequate search "[i]n the absence of countervailing evidence or apparent inconsistency of proof"); see also FOIA Update, Jan. 1983, at 6.

[98] Oglesby v. Department of the Army, 920 F.2d at 68; see Maynard v. CIA, 986 F.2d at 559.

[99] See, e.g., Maynard v. CIA, 986 F.2d at 560 ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); Safecard Servs., Inc. v. SEC, 926 F.2d at 1202 (employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); Meeropol v. Meese, 790 F.2d at 951 (supervisor/affiant properly relied on information provided by personnel who actually performed search); Carney v. United States Dep't of Justice, No. 92-CV-6204, slip op. at 11-12 (W.D.N.Y. Apr. 27, 1993) ("There is no basis in either the statute or the relevant caselaw to require that an agency effectively establish by a series of sworn affidavits a 'chain of custody' over its search process. The format of the proof submitted by defendant--declarations of supervisory employees, signed under penalty of perjury--is sufficient for purposes of both the statute and Fed.R.Civ.P. 56.") (appeal pending); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (where third party claimed to have knowledge of additional documents, affidavit of agency employee who contacted that party found sufficient); Pennsylvania Dep't of Pub. Welfare v. HHS, No. 84-0690, slip op. at 3-4 (M.D. Pa. Nov. 10, 1985) (affidavits of supervisory officials who directed search held adequate); cf. Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (although agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor, affidavit must also describe search).

[100] See, e.g., Oglesby v. Department of the Army, 920 F.2d at 68; Southam News v. INS, 674 F. Supp. 881, 889-91 (D.D.C. 1987); Hydron Lab., Inc. v. EPA, 560 F. Supp. 718, 721 (D.R.I. 1983); see also Lindsey v. NSC, No. 84-3897, slip op. at 2 (D.D.C. Mar. 11, 1985) (government rebuked for not submitting affidavit describing whether search was legally sufficient); Applegate v.
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For example, summary judgment has been denied where the agency's affidavit described circumstances in which destruction of the requested records may have occurred, but the affidavit failed to specify that destruction had in fact occurred.[101] Where an agency's search is disputed, a grant of summary judgment to the agency may be reversed and remanded where the district court fails to expressly hold that a disputed search was adequate under the "reasonableness" standard.[102]

Mootness

In a FOIA action, the courts have jurisdiction only where an agency has improperly withheld agency records.[103] Therefore, if during the litigation of a FOIA lawsuit it is determined that all documents found responsive to the underlying FOIA request have been released in full to the requester, the suit should be dismissed on mootness grounds as there is no justiciable controversy.[104]

Dismissal of a FOIA lawsuit can be appropriate also when the plaintiff

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[100](...continued)
NRC, 3 Gov't Disclosure Serv. (P-H) ¶ 83,081, at 83,614 (D.D.C. Jan. 18, 1983) (permitting discovery on adequacy of search), summary judgment granted, 3 Gov't Disclosure Serv. (P-H) ¶ 83,201, at 83,887 (D.D.C. May 24, 1983) (court held for government but found it "disturbing" that agency designed "a filing and oral search system which could frustrate the clear and express purposes of FOIA").

[101] Pafenberg v. Department of the Army, No. 82-2113, slip op. at 12 (D.D.C. Nov. 22, 1983) ("Casual destruction of [the requested] materials seems unlikely, and cannot be demonstrated by the conjecture of one official, where defendants have themselves admitted the existence of a body of information pertaining to the handling of the requested materials.").

[102] Krikorian v. Department of State, 984 F.2d at 468 (requiring express findings by district court on adequacy of search issue).

[103] 5 U.S.C. § 552(a)(4)(B) (1988).

[104] See In re Wade, 969 F.2d 241, 248 (7th Cir. 1992); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987); DeBold v. Stimson, 735 F.2d 1037, 1040 (7th Cir. 1984); Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982); Crooker v. United States Dep't of State, 628 F.2d 9, 10 (D.C. Cir. 1980); see also, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 842 (6th Cir. 1988) (full disclosure of records pursuant to district court order moots appeal); Mitchell v. Kemp, No. 91 Civ. 2983, slip op. at 8-9, 11 (S.D.N.Y. July 27, 1992) (dismissal for mootness warranted where "all unproduced documents that would have been responsive to [plaintiff's] request were destroyed before he requested them"); cf. Anderson v. HHS, 907 F.2d 936, 941 (10th Cir. 1990) (although plaintiff had already obtained all responsive documents, subject to protective order, in private civil litigation, plaintiff's FOIA litigation to obtain documents free from any such restriction still viable).

fails to prosecute the suit.[105] Dismissal likewise may be appropriate where: (1) records are publicly available upon payment of fees;[106] (2) a complete factual record has yet to be presented to the agency;[107] (3) there is a change in the factual circumstances underlying the lawsuit;[108] or (4) the agency is processing responsive records.[109] However, it has been held that a FOIA claim may survive the death of the plaintiff and, under some circumstances, may be continued by a properly substituted party.[110]

In Payne Enterprises v. United States, the Court of Appeals for the District of Columbia Circuit held that when records are routinely withheld at the initial processing level, but consistently released after an administrative appeal, and when this situation results in continuing injury to the requester, a lawsuit challenging that practice is ripe for adjudication and is not subject to dismissal on the basis of mootness.[111] The defendant agency's "voluntary cessation" of that practice in Payne did not moot the case where the plaintiff challenged the agency's policy as an unlawful, continuing wrong.[112]

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[105] See, e.g., Warden v. FBI, 530 F. Supp. 66, 68-69 (N.D. Ill. 1981).

[106] See, e.g., Kleinerman v. Patent & Trademark Office, No. 82-295, slip op. at 2-3 (D. Mass. Apr. 25, 1983).

[107] See, e.g., Rodrequez v. United States Postal Serv., No. 90-1886, slip op. at 4-5 (D.D.C. Oct. 2, 1991) (absent submission of further information enabling identification of plaintiff's records from among those of 36 persons with same name, case not yet ripe); National Sec. Archive v. United States Dep't of Commerce, No. 87-1581, slip op. at 6 (D.D.C. Nov. 25, 1987) (fee waiver case).

[108] See, e.g., National Wildlife Fed'n v. Department of the Interior, No. 83-3586, slip op. at 6-7 (D.D.C. Oct. 15, 1987) (suit challenging fee waiver guidelines dismissed as moot after pertinent FOIA section amended).

[109] See, e.g., Voinche v. FBI, No. 93-4262, slip op. 6153, 6154 (5th Cir. Sept. 3, 1993) (because sole issue in action based on 5 U.S.C. § 552(a)(6)(C) is "tardiness" of agency response, district court litigation rendered moot by agency's disclosure determination) (to be published); Larson v. Executive Office for United States Attorneys, No. 85-6226, slip op. at 4-5 (D.C. Cir. Apr. 6, 1988) (appeal of district court denial of relief to plaintiff for defendant's processing delays mooted upon completion of processing).

[110] See D'Aleo v. Department of the Navy, No. 89-2347, slip op. at 2-3 (D.D.C. Mar. 27, 1991) (deceased plaintiff's sister, appointed executrix of his estate, substituted as plaintiff). But see Hayles v. United States Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (case dismissed upon death of plaintiff where no timely motion for substitution filed).

[111] 837 F.2d 486, 488-93 (D.C. Cir. 1988).

[112] Id. at 491; see also, e.g., Hercules, Inc. v. Marsh, 839 F.2d 1027, 1028 (4th Cir. 1988) (threat of disclosure of agency telephone directory not mooted (continued...)

LITIGATION CONSIDERATIONS

Of course, a claim for attorney fees or costs survives dismissal of a FOIA action for mootness.[113] When agencies belatedly release requested records in the midst of a FOIA lawsuit, courts frown upon efforts to avoid, on mootness grounds, the payment of attorney fees.[114] (See discussion of Attorney Fees and Litigation Costs, below.)

A FOIA lawsuit may be precluded by the doctrine of res judicata (claim preclusion) when it is brought by a plaintiff against the same agency for the same documents whose withholding has been previously adjudicated.[115] How-

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[112](...continued)
by release because new request for subsequent directory pending; agency action thus "capable of repetition yet evading review") ("reverse" FOIA context); Better Gov't Ass'n v. Department of State, 780 F.2d 86, 90-91 (D.C. Cir. 1986) (although challenge to fee waiver standards as applied held moot, challenge to facial validity of standards held ripe and not moot); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (despite disclosure of specific records requested, court retains jurisdiction where plaintiff challenges "agency's policy to withhold temporarily, on a regular basis, certain types of documents"); accord Public Citizen v. OSHA, No. 86-705, slip op. at 2 (D.D.C. Aug. 5, 1987). But see Atkins v. Department of Justice, No. 90-5095, slip op. at 1 (D.C. Cir. Sept. 18, 1991) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request.").

[113] Anderson v. HHS, No. 92-4125, slip op. at 4 (10th Cir. Aug. 27, 1993) ("'We think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.'" (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988))); Carter v. VA, 780 F.2d 1479, 1481-82 (9th Cir. 1986); Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 884-86 (6th Cir. 1984); DeBold v. Stimson, 735 F.2d at 1040; Webb v. HHS, 696 F.2d 101, 107-08 (D.C. Cir. 1982).

[114] See, e.g., Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 4-5 (D. Ariz. Dec. 12, 1987) (government should not be able to foreclose recovery of attorney fees whenever it chooses to moot an action by releasing records after having denied disclosure at administrative level); Harrison Bros. Meat Packing Co. v. United States Dep't of Agric., 640 F. Supp. 402, 405-06 (M.D. Pa. 1986) (finding it "ludicrous" for government to "suddenly and inexplicably" release records and assert mootness to avoid paying fees after having denied disclosure at administrative level).

[115] Fazzini v. United States Dep't of Justice, No. 92-5043, slip op. at 1 (D.C. Cir. Oct. 14, 1992) (per curiam); National Treasury Employees Union v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985); Hanner v. Stone, No. 92-CV-72719, slip op. at 3-7 (E.D. Mich. Oct. 26, 1992), aff'd, No. 92-2565 (6th Cir. Aug. 6, 1993); see also Heckman v. Olive, No. CV-88-2981, slip op. at 14 (E.D.N.Y. Dec. 9, 1992) (appeal pending); Prows v. United States Dep't of Justice, No. 90-2561, slip op. at 3-4 (D.D.C. Mar. 30, 1992); Stimac v. Treas-
(continued...)

ever, a subsequent claim for records is not precluded by res judicata where the litigation of an earlier, non-FOIA case involving the same records did not permit raising a FOIA claim.[116] In addition, res judicata is not applicable where there has been a change in the factual circumstances or legal principles applicable to the lawsuit.[117]

Litigation also may be foreclosed by the applicability of the doctrine of collateral estoppel (issue preclusion), which precludes relitigation of an issue previously litigated by one party to the action.[118] As with the doctrine of res judicata, collateral estoppel is not applicable to a subsequent lawsuit if there is

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[115](...continued)
ury Dep't, No. 87-C-4005, slip op. at 4 (N.D. Ill. Jan. 15, 1988), aff'd, 872 F.2d 424 (4th Cir. 1989) (table cite); Crooker v. United States Dep't of Justice, No. 86-2333, slip op. at 3-4 (D.D.C. Oct. 2, 1987), aff'd, No. 87-5372 (D.C. Cir. Apr. 8, 1988); Crooker v. United States Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C. 1986); FOIA Update, Summer 1985, at 6 ("FOIA Counselor: 'Preclusion' Doctrines Under the FOIA"); compare Hanner v. Stone, No. 92-2565, slip op. at 2 (under doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action") (emphasis added) with Hanner v. Stone, No. 92-1579, slip op. at 1 (6th Cir. Dec. 8, 1992) (where appellate court had previously adjudicated a claim that is similar, but involving a different issue, present claim not precluded under res judicata).

[116] See North v. Walsh, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (claim for records under FOIA not barred by prior discovery prohibition for same records in criminal case in which FOIA claim could not have been interposed).

[117] See, e.g., Graphic Communications Int'l Union, Local 554 v. Salem-Gravure, 843 F.2d 1490, 1493 (D.C. Cir. 1988) (non-FOIA case); Wolfe v. Froehlke, 358 F. Supp. 1318, 1219 (D.D.C. 1973) (lawsuit not barred because national security status changed), aff'd, 510 F.2d 654 (D.C. Cir. 1974); see also FOIA Update, Summer 1985, at 6.

[118] Yahama Corp. of America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) (non-FOIA case); see Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 750-51 (9th Cir. 1980) (complete identity of plaintiff and document at issue precludes relitigation); Williams v. Executive Office for United States Attorneys, No. 89-3071, slip op. at 3-4 (D.D.C. Mar. 19, 1991) (same); see also FOIA Update, Summer 1985, at 6. But see North v. Walsh, 881 F.2d at 1093-95 (issue preclusion inapplicable where exemption issues raised in FOIA action differ from relevancy issues raised in prior action for discovery access to same records); Ely v. FBI, No. 83-876-T-15, slip op. at 4 (M.D. Fla. July 13, 1988) (collateral estoppel not appropriate where plaintiff did not have "full and fair opportunity to litigate" defendant's claim of privilege); Robertson v. DOD, 402 F. Supp. 1342, 1347 (D.D.C. 1973) (private citizen's interest in subsequent FOIA action was not protected by government in prior "reverse" FOIA suit over same documents because interests not congruent).

an intervening material change in the law or factual predicate.[119]

"Vaughn Index"

A distinguishing feature of FOIA litigation is that the defending agency bears the burden of sustaining its action of withholding records.[120] The most commonly used device for meeting this burden of proof is the "Vaughn Index," fashioned by the Court of Appeals for the District of Columbia Circuit in Vaughn v. Rosen.[121]

The Vaughn Index came into prominence mainly as a result of the 1974 amendments to the FOIA, especially due to the addition of the "reasonably segregable" provision to subsection (b).[122] This requirement that agencies segregate and release disclosable information from that which is exempt grew out of congressional concern in 1974 over the agencies' sweeping application of exemptions up to that time.[123] Particularly in cases involving large numbers of documents, the requirement that courts conduct a de novo review of each portion of a record at issue effectively transferred the burden from agencies to the courts themselves. Moreover, reliance on in camera examination had the effect of weakening the adversarial process somewhat, as it afforded a plaintiff and his counsel no real input to the merits of a case.[124]

The Vaughn decision addressed these concerns by requiring agencies to prepare an itemized index, correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.[125] Such an index not only makes the trial court's job more manageable, it also enhances appellate review by ensuring that a full public record is available upon which to base an appellate decision.[126] If an index is

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[119] See, e.g., Minnis v. United States Dep't of Agric., 737 F.2d 784, 786 n.1 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

[120] 5 U.S.C. § 552(a)(4)(B) (1988).

[121] 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[122] 5 U.S.C. § 552(b) (final sentence).

[123] See generally H.R. Rep. No. 876, 93d Cong., 2d Sess. 7 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6292.

[124] See King v. United States Dep't of Justice, 830 F.2d 210, 218 (D.C. Cir. 1987); Vaughn v. Rosen, 484 F.2d at 826.

[125] Vaughn v. Rosen 484 F.2d at 827; accord King v. United States Dep't of Justice, 830 F.2d at 217.

[126] See Vaughn v. Rosen, 484 F.2d at 824-25; King v. United States Dep't of Justice, 830 F.2d at 219; see also Ingle v. Department of Justice, 698 F.2d 259, 263-64 (6th Cir. 1983). But see Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) (no index required where small number of documents at issue

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not sufficiently detailed, a court may remand and require a more detailed index.[127]

The Vaughn Index has evolved into an extremely effective tool with which to resolve FOIA cases, developing various permutations to fit particular circumstances. Courts have routinely accepted the observation that "[t]here is no set formula for a Vaughn index; . . . it is the function, not the form, which is important."[128] In fact, "[a]ll that is required, and that is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure."[129] Therefore, "[t]he degree of specificity of itemization, justification, and correlation required in a particular case will . . . depend on the nature of the document at issue and the particular exemption asserted."[130] However, in order to fulfill its purpose, a Vaughn

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[126](...continued)
and affidavit contains sufficient detail); National Treasury Employees Union v. United States Customs Serv., 602 F. Supp. 469, 473 (D.D.C. 1984) (fact that only one exemption is involved "nullif[ies] the need to formulate the type of itemization and correlation system required by the Court of Appeals in Vaughn"), aff'd, 802 F.2d 525 (D.C. Cir. 1986).

[127] See Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979) (also seemingly establishing requirement that Vaughn Index be contained in no more than one document per case).

[128] Hinton v. Department of Justice, 844 F.2d 126, 129 (3d Cir. 1988); see Keys v. United States Dep't of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987).

[129] Hinton v. Department of Justice, 844 F.2d at 129; see Miscavige v. IRS, No. 92-8659, slip op. 3284, 3826-27 (11th Cir. Sept. 17, 1993) (separate document, expressly designated as "Vaughn Index" unnecessary where agency "declarations are highly detailed, focus on the individual documents, and provide a factual base for withholding each document at issue") (to be published).

[130] Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); see, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24 (1978) (generic explanations, focusing on types of records and harm to investigations resulting from disclosure, permitted under Exemption 7(A)); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1282 n.4 (D.C. Cir. 1992) (precise matching of exemptions with specific withheld items "may well be unnecessary" when all of government's generic claims have merit); Vaughn v. United States, 936 F.2d 862, 868 (6th Cir. 1991) (categorical approach approved where over 1,000 pages were withheld under Exemptions 3, 5, 7(A), 7(C), 7(D) and 7(E)); Keys v. United States Dep't of Justice, 839 F.2d at 349 (upholding adequacy of indexing system of generic explanations which need not specifically address each deletion); Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983) (no index required in third-party request for records where agency would neither confirm nor deny existence of records on particular individuals absent showing of public interest in disclosure), cert. denied, 467 U.S. 1210 (1984); Linneman v. FBI, No. 89-505, slip op. at 7-8 (D.D.C. July
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Index should either expressly specify[131] or, at a minimum, plainly reflect[132] that all segregable information has been disclosed.

When voluminous records are at issue, courts have sanctioned the use of

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[130](...continued)
13, 1992) ("traditional" index not required to justify withholding solely of identities of confidential sources and law enforcement personnel in criminal investigation); Peco v. United States Dep't of Justice, No. 86-3185, slip op. at 1-2 (D.D.C. July 28, 1988) (Vaughn Index not required where affidavit provides sufficient justification for claimed exemptions); Ferri v. United States Dep't of Justice, 573 F. Supp. 852, 856-57 (W.D. Pa. 1983) (6,000 pages of grand jury testimony not indexed held sufficiently described); Agee v. CIA, 517 F. Supp. 1335, 1337-38 (D.D.C. 1981) (index listing 15 categories upheld where more specific index would compromise national security); see also Airline Pilots Ass'n v. FAA, 552 F. Supp. 811, 815 (D.D.C. 1982) (Vaughn Index not required where agency provided requester with equivalent of information that it would provide). But see King v United States Dep't of Justice, 830 F.2d at 224 (requiring more complete Vaughn Index to support Exemption 1 claim for particularly old records).

[131] See Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (inherently erroneous for district court to approve withholding of entire document without entering finding on segregability); Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (same); PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (remand required because of failure of either affidavit or district court to address issue of segregability of Exemption 7(E) material); Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (notwithstanding district court's in camera review, case remanded for specific findings on segregability where agency withheld documents in entireties and failed to correlate exemptions with particular record segments to which exemptions applied); Wiener v. FBI, 943 F.2d 972, 988 (9th Cir. 1991) ("The court on remand must make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable."), cert. denied, 112 S. Ct. 3013 (1992); see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) ("boilerplate" statement that "no segregation of non-exempt, meaningful information can be made for disclosure" deemed "entirely insufficient").

[132] See Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, No. C-89-1843, slip op. at 12 (N.D. Cal. June 4, 1993) ("specific claim regarding segregability" not required where "brevity of the document in question and the detail in which the contents of the document and the reason for its withholding are described" were sufficient to enable court to discern absence of segregable, nonexempt, material); Holland v. CIA, No. 91-1233, slip op. at 22 (D.D.C. Aug. 31, 1992) (proper segregation apparent from express statement by affiant combined with review of documents as redacted); Dusenberry v. FBI, No. 91-665, slip op. at 5 (D.D.C. May 5, 1992) (accepting government's representations that "[t]he subject matter of these specific pages, as described, makes it impossible to segregate disclosable material").

Vaughn Indexes based upon representative samplings of the withheld documents.[133] This special procedure "allows the court and the parties to reduce a voluminous FOIA exemption case to a manageable number of items" for the Vaughn Index and, "[i]f the sample is well-chosen, a court can, with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'"[134] Once a representative sampling of the withheld documents is agreed to, however, the agency's subsequent release of some of those documents may destroy the representativeness of the sample and thereby raise questions about the propriety of withholding other responsive, non-sample, documents.[135] In recognition of this danger, the D.C. Circuit has held that an agency "must justify its initial withholdings and is not relieved of that burden by a later turnover of sample documents," and that "the district court must determine whether the released documents were properly redacted [when] initially reviewed."[136]

The courts have generally accepted the use of "coded" indexes--in which agencies break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then correlate the exemption and category to the particular documents at issue.[137] The general

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[133] See, e.g., Meeropol v. Meese, 790 F.2d 942, 956-57 (D.C. Cir. 1986) (index of sampling of every 100th document allowed where approximately 20,000 documents were at issue); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (index of sampling of withheld documents allowed, where over 60,000 pages at issue, even though no example of certain exemptions provided); Jones v. FBI, No. C77-1001, slip op. at 4 (N.D. Ohio Aug. 12, 1992) (sample of 57 documents, comprising two percent of total number of documents at issue, held adequate) (appeal pending); Washington Post v. DOD, 766 F. Supp. 1, 15-16 (D.D.C. 1991) (where more than 14,000 pages of responsive material involved, agency should produce detailed Vaughn Index for sample of files, such sample to be determined by parties or court); Peck v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,353, at 82,916 (N.D. Ohio Nov. 25, 1981) (sample Vaughn Index of "one of every 50 documents" employed "for the purpose of relieving defendants of the burden and expense of preparing a complete index"). But see SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 7-9 (D.D.C. May 19, 1988) (burden of indexing relatively small number of documents--approximately 200--insufficient to justify sampling).

[134] Bonner v. United States Dep't of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991) (quoting Fensterwald v. CIA, 443 F. Supp. 667, 669 (D.D.C. 1977)).

[135] Id. at 1153-54.

[136] Id. at 1154.

[137] See, e.g., Maynard v. CIA, 986 F.2d 547, 559 n.13 (1st Cir. 1993); Keys v. United States Dep't of Justice, 830 F.2d at 349; Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 803 (D.D.C. 1992) (appeal pending); Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851, 859 (D.D.C. 1989); Branch v. FBI, 658 F. Supp. 204, 206-07

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acceptability of coded indexes is consistent with the Supreme Court's endorsement of "workable rules" under which general categories of records may be uniformly withheld under FOIA exemptions "without regard to individual circumstances."[138] Innovative formats for "coded" affidavits have been found acceptable, so long as they enhance the ultimate goal of overall "descriptive accuracy" of the affidavit.[139] A "coded" affidavit has been held sufficient when "[e]ach deletion was correlated specifically and unambiguously to the corresponding exemption [which] . . . was adequately explained by functional categories . . . [so as to] place[] each document into its historical and investigative perspective."[140]

The D.C. Circuit has gone so far as to hold that the district court judge's review of only the expurgated documents--an integral part of the "coded" affidavit--was sufficient in a situation in which the applicable exemption was obvious from the face of the documents.[141] However, this approach has been found inadequate where the coded categories are too "far ranging" and more detailed subcategories could be provided.[142] Indeed, where numerous pages of records are withheld in full, a "coded" affidavit that does not specifically

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(D.D.C. 1987); United States Student Ass'n v. CIA, 620 F. Supp. 565, 568 (D.D.C. 1985); Bevis v. Department of State, 575 F. Supp. 1253, 1255 (D.D.C. 1983); Bubar v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,477, at 83,158 (D.D.C. Sept. 3, 1982). But see Wiener v. FBI, 943 F.2d at 978-79 (rejecting coded affidavits on ground that such categorical descriptions fail to give requester sufficient opportunity to contest withholdings).

[138] United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 779-80 (1989).

[139] National Sec. Archive v. Office of Indep. Counsel, No. 89-2308, slip op. at 6-7 (D.D.C. Aug. 28, 1992) (where information withheld by multiple agencies under various exemptions, "alphabetical classification" employed to facilitate coordination of withholding justifications); see King v. United States Dep't of Justice, 830 F.2d at 225.

[140] Keys v. United States Dep't of Justice, 830 F.2d at 349-50 (citations omitted); see Maynard v. CIA, 986 F.2d at 559 n.13; cf. Varelli v. FBI, No. 88-1865, slip op. at 5-6 & n.4 (D.D.C. Oct. 4, 1991) (coded index employing "eight separate codes for the national security information withheld" deemed adequate).

[141] Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 128 (D.C. Cir. 1987); see Whittle v. Moschella, 756 F. Supp. 589, 595 (D.D.C. 1991) ("For two large redactions, the contents are not readily apparent, but since the information there redacted was provided by confidential sources, it is entirely protected from disclosure."); see also King v. United States Dep't of Justice, 830 F.2d at 221 ("Utilization of reproductions of the material released to supply contextual information about material withheld is clearly permissible, but caution should be exercised in resorting to this method of description.").

[142] King v. United States Dep't of Justice, 830 F.2d at 221-22.

correlate multiple exemption claims to particular portions of the pages withheld has been found to be impermissibly conclusory.[143]

Agencies employing "coded" indexes ordinarily attach copies of the records released in part--i.e., the "expurgated" documents--as part of their public Vaughn submission. But agencies seeking to justify withholding records from first-party FOIA requesters should be mindful of the fact that the public filing of expurgated documents about the individual requester (or even detailed descriptions of them in briefs) may constitute a "disclosure" under subsection (b) of the Privacy Act of 1974.[144] Unless proceeding under seal, or with the prior written consent of the requester, an agency should make such a disclosure only in accordance with one of the exceptions set forth in the Privacy Act--such as the "routine use" exception.[145]

In an extreme, and probably unworkable, departure from the overall trend toward "workable rules" and more efficient and streamlined Vaughn indices, the Court of Appeals for the Ninth Circuit has rejected the government's use of a coded Vaughn Index, even where further supplemented by the district court's in camera review of all withheld documents.[146] In reaching this singular conclusion, the Ninth Circuit placed an unprecedented emphasis upon the role of the Vaughn Index in "afford[ing] the requester an opportunity to intelligently advocate the release of the withheld documents."[147] It entirely neglected to explain, however, how such exacting specificity could be made public without

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[143] See Coleman v. FBI, No. 89-2773, slip op. at 9-12 (D.D.C. Apr. 3, 1991) (allowing "coded" affidavit for expurgated pages, but rejecting it as to pages withheld in full), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); see also Williams v. FBI, No. 90-2299, slip op. at 11-12 (D.D.C. Aug. 6, 1991) ("coded" affidavit found insufficiently descriptive as to documents withheld in their entireties).

[144] 5 U.S.C. § 552a(b) (1988 & Supp. IV 1992); see, e.g., Krohn v. United States Dep't of Justice, No. 78-1536, slip op. at 2-7 (D.D.C. Mar. 19, 1984), vacated in part on other grounds (D.D.C. Nov. 29, 1984); Citizens Bureau of Investigation v. FBI, No. C78-80, slip op. at 3 (N.D. Ohio Dec. 12, 1979); see also Laningham v. United States Navy, No. 83-3238, slip op. at 2-3 (D.D.C. Sept. 25, 1984), summary judgment granted (D.D.C. Jan. 7, 1985), aff'd per curiam, 813 F.2d 1236 (D.C. Cir. 1987).

[145] 5 U.S.C. § 552a(b)(3); see, e.g., 53 Fed. Reg. 2651 (1988) (routine use (number 7) applicable to records in Justice Department's "Civil Division Case File System"); 53 Fed. Reg. 1865 (1988) (routine uses (letters "o" and "p") applicable to records in U.S. Attorneys' Offices' "Civil Case Files").

[146] Wiener v. FBI, 943 F.2d at 977 (rejecting adequacy of Vaughn Index for withholdings under Exemptions 1, 3, 7(C) and 7(D) for "lack of specificity").

[147] Id. at 979; see also United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2024 (1993).

jeopardizing disclosure of the very information being protected.[148] Within the Ninth Circuit, this decision has led district courts to order the preparation of far more detailed Vaughn Indexes in a number of cases.[149]

Although, an agency ordinarily must justify its withholdings on a page-by-page or document-by-document basis, under certain circumstances courts have approved withholdings of entire, but discrete, categories of records which encompass similar information.[150] Most commonly, courts have permitted the withholding of records under Exemption 7(A) on a category-by-category or "generic" basis.[151] While the outermost contours of what constitutes an ac-

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[148] Cf. Simon v. United States Dep't of Justice, 980 F.2d 782, 784 (D.C. Cir. 1992) (rejecting appellant's Wiener-based argument and holding that despite inadequacy of Vaughn Index, in camera review--"although admittedly imperfect for the reason the appellant states--is the best way to assure both that the agency is entitled to the exemption it claims and that the confidential source is protected").

[149] See, e.g., Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. at 1298 (declarations insufficient "for failure to identify what specific harm will befall disclosure of a particular withheld document"); Church of Scientology Int'l v. IRS, No. 89-4504, slip op. at 2-4 (C.D. Cal. Jan. 7, 1992) (in light of Wiener, IRS ordered to supplement 38-volume Vaughn Index, exceeding 3800 pages, within 90 days); Church of Scientology Int'l v. IRS, No. 91-1025, slip op. at 3 (C.D. Cal. Nov. 14, 1991) ("The Ninth Circuit has made it very clear that withholdings under the FOIA must be very specifically detailed, and that where Vaughn Indexes are ordered, they are not only for the benefit of courts, but also to enable plaintiffs to competently engage in the adversarial process.").

[150] See NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 212-13 (language of Exemption 7(A) "appears to contemplate that certain generic determinations may be made"); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64, 66-67 (D.C. Cir. 1986) (distinguishing between unacceptable "blanket" exemptions and permissible generic determinations); see also United States Dep't of Justice v. Landano, 113 S. Ct. at 2023 ("There may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred."); United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 776 ("categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction").

[151] See, e.g., NRLB v. Robbins Tire & Rubber Co., 417 U.S. at 218-23 (endorsing government's position "that a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure [under Exemption 7(A)] while the hearing is pending"); In re Department of Justice, No. 91-2080, slip op. at 13-14 (8th Cir. Aug. 5, 1993) (en banc) (to be published); Dickerson v. Department of Justice, 992 F.2d 1426, 1428-31 (6th Cir. 1993) (approving FBI justification of Exemption 7(A) for documents pertaining

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ceptable "generic" Vaughn are sometimes unclear,[152] it appears well established that if the agency has (1) defined its Exemption 7(A) categories functionally, (2) conducted a document-by-document review in order to assign documents to the proper category, and (3) explained how the release of each category of information would interfere with the enforcement proceedings, the description will be found sufficient.[153] Moreover, where "a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains [so that] resort to a Vaughn index is futile,"[154] such generic descriptions can also satisfy an agency's Vaughn obligation with regard to other exemptions as well.[155]

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[151](...continued)
to disappearance of Jimmy Hoffa on "category-by-document" basis by supplying "a general description of the contents of the investigatory files, categorizing the records by source or function"); Lewis v. IRS, 823 F.2d 375, 389 (9th Cir. 1987) ("The IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings."); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 9 (D.D.C. Sept. 25, 1992) ("The agency is allowed to use categorical descriptions to explain how the information would interfere with law enforcement proceedings, as long as the categories are sufficiently defined so as to allow the Court to determine whether the alleged harm is likely to occur."); May v. IRS, No. 90-1123, slip op. at 5 (W.D. Mo. Dec. 9, 1991) ("Because the plaintiff's requests basically encompass all documents relating to his pending investigation, the documents in question fit into a genus that does not warrant a document-by-document review."); see also FOIA Update, Spring 1984, at 3-4.

[152] Compare Curran v. Department of Justice, 813 F.2d 473, 476 (1st Cir. 1987) (approving category entitled "other sundry items of information" because "[a]bsent a 'miscellaneous' category of this sort, the FBI would, especially in the case of one-of-a-kind record, have to resort to just the sort of precise description which would itself compromise the exemption") and May v. IRS, slip op. at 6-7 (approving categories of "intra-agency memoranda" and "work sheets") with Bevis v. Department of State, 801 F.2d 1386, 1390 (D.C. Cir. 1986) ("categories identified only as 'teletypes,' or 'airtels,' or 'letters'" held inadequate).

[153] In re Department of Justice, slip op. at 14 (citing Bevis v. Department of State, 801 F.2d at 1389-90); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 806 (D.N.J. 1993); see Dickerson v. Department of Justice, 992 F.2d at 1433 (enumerating categories of information withheld); Curran v. Department of Justice, 813 F.2d at 476 (same); May v. IRS, slip op. at 6-7 (same); see also Docal v. Bennsinger, 543 F. Supp. 38, 44 n.12 (M.D. Pa. 1981) (enumerating categories of "interference"); cf. Curran v. Department of Justice, 813 F.2d at 476 (stating that FBI affidavit met Bevis test and therefore finding it unnecessary to determine whether Bevis test is too demanding).

[154] Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C. Cir. 1986).

[155] See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 779-80 (authorizing "categorical" protection of informa-
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It also should be noted that the "single document Vaughn index requirement" purportedly established in Founding Church of Scientology v. Bell,[156] is not followed as a practical matter, particularly where more than one agency is involved in a suit.[157] Additionally, it has been suggested that in certain circumstances a Vaughn affidavit which by itself would be inadequate to support withholding may be supplemented by in camera review of withheld material.[158] (See discussion of In Camera Inspection, below.)

In a broad range of contexts, most courts have refused to require agencies to file public Vaughn Indexes which are so detailed as to reveal sensitive information, the withholding of which is the very issue in the litigation.[159] There-

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[155](...continued)
tion under Exemption 7(C)); Church of Scientology v. IRS, 792 F.2d at 152 (generic exemption under IRS Exemption 3 statute, 26 U.S.C. § 6103, appropriate if "affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category"); Helmsley v. United States Dep't of Justice, slip op. at 3-13 (categorical descriptions accepted for withholdings under Exemptions 3 (in conjunction with Rule 6(e) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 6103), 5, 7(A), 7(C) and 7(D)); MCI Telecommunications Corp. v. GSA, No. 89-0746, slip op. at 5-10 (D.D.C. Mar. 25, 1992) (Exemption 5 withholdings); May v IRS, slip op. at 9 (withholdings protected under both Exemption 7(A) and 28 U.S.C. § 6103); National Treasury Employees Union v. United States Customs Serv., 602 F. Supp. 469, 472-73 (D.D.C. 1984) (no index required for 44 employee-evaluation forms withheld under Exemption 2); see also FOIA Update, Spring 1989, at 6.

[156] 603 F.2d at 949.

[157] See, e.g., Afshar v. Department of State, 702 F.2d 1125, 1144-45 (D.C. Cir. 1983) (more than one affidavit may be supplied); United States Student Ass'n v. CIA, 620 F. Supp. at 567-68 (in request for voluminous documents, agency filed monthly indices as documents indexed).

[158] See, e.g., Maynard v. CIA, 986 F.2d at 557 ("Where, as here, the agency, for good reason, does not furnish publicly the kind of detail required for a satisfactory Vaughn index, a district court may review the documents in camera."); King v. United States Dep't of Justice, 830 F.2d at 225; Williams v. FBI, slip op. at 12; SafeCard Servs., Inc. v. SEC, slip op. at 12 n.7; Struth v. FBI, 673 F. Supp. 949, 956 (E.D. Wis. 1987); see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the decision exists."). Contra Wiener v. FBI, 943 F.2d at 979 ("In camera review of the withheld documents by the court is not an acceptable substitute for an adequate Vaughn index.").

[159] See, e.g., United States Dep't of Justice v. Landano, 113 S. Ct. at 2024 ("To the extent that the Government's proof may compromise legitimate interests, of course, the Government still can attempt to meet its burden with in camera affidavits."); Maynard v. CIA, 986 F.2d at 557 (although public decla-
(continued...)

fore, in camera affidavits are frequently utilized in Exemption 1 cases, as is discussed below, where a public description of responsive documents would compromise national security.[160] The same principle has been applied in Exemption 5 cases,[161] in the context of Exemption 7(A),[162] and in Exemption 7(D) litigation.[163]

Finally, it should be noted that courts generally do not require the submission of a Vaughn Index prior to the time at which a dispositive motion is filed. This standard practice is based upon the need to maintain an orderly and efficient adjudicative process in FOIA cases, and upon the practical reality that

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[159](...continued)
ration "lacked specifics, a more detailed affidavit could have revealed the very intelligence sources or methods that the CIA wished to keep secret"); Curran v. Department of Justice, 813 F.2d at 476 (agency should not be forced "to resort to just the sort of precise description which would itself compromise the exemption"); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980) ("the government need not specify its objections in such detail as to compromise the secrecy of the information"); Manna v. United States Dep't of Justice, 815 F. Supp. at 817 ("[P]laintiff's request for a Vaughn index must be denied because submission of a detailed Vaughn index may present the same risks that production of the underlying documents presents."). But see Wiener v. FBI, 943 F.2d at 977-87.

[160] See, e.g., Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983); Keys v. United States Dep't of Justice, No. 85-2588, slip op. at 3 (D.D.C. May 12, 1986), aff'd on other grounds, 830 F.2d at 337; see also CIA v. Sims, 471 U.S. 159, 179 (1985) ("the mere explanation of why information must be withheld can convey [harmful] information").

[161] See, e.g., Wolfe v. HHS, 839 F.2d 768, 771 n.3 (D.C. Cir. 1988) (en banc) ("Where the index itself would reveal significant aspects of the deliberative process, this court has not hesitated to limit consideration of the Vaughn index to in camera inspection.").

[162] See, e.g., Alyeska Pipeline Serv. Co. v. EPA, No. 86-2176, slip op. at 8 (D.D.C. Sept. 9, 1987) ("[R]equiring a Vaughn index in this matter will result in exactly the kind of harm to defendant's law enforcement proceedings which it is trying to avoid under exemption 7(A)."), aff'd on other grounds, 856 F.2d 309 (D.C. Cir. 1988); Dickerson v. Department of Justice, No. 90-60045, slip op. at 4-5 (E.D. Mich. July 31, 1991), aff'd, 992 F.2d 1426 (6th Cir. 1993).

[163] See, e.g., United States Dep't of Justice v. Landano, 113 S. Ct. at 2024 (government can meet its burden with in camera affidavits in order to avoid identification of sources in Exemption 7(D) withholdings); Keys v. United States Dep't of Justice, 830 F.2d at 349 (no requirement to produce Vaughn Index in "degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold"); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 21 (D.D.C. 1992) ("[A] meaningful description beyond that provided by the Vaughn code utilized in this case would probably lead to disclosure of the identity of sources.").

some form of affidavit, declaration or index virtually always accompanies the defendant agency's motion for summary judgment.[164] Efforts to compel the preparation of Vaughn indices prior to the time of an agency's dispositive motion are typically denied as premature.[165]

In Camera Inspection

In camera examination of documents is specifically authorized in the statutory language of the FOIA,[166] but it certainly is the exception and not the

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[164] See, e.g., Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 1 (D.D.C. Aug. 20, 1987) (standard practice is to await filing of agency's dispositive motion before deciding whether additional indexes will be necessary); British Airports Auth. v. CAB, 2 Gov't Disclosure Serv. (P-H) ¶ 81,234, at 81,654 (D.D.C. June 25, 1981) ("standard practice which has developed is for the Court to commit the parties to a schedule for briefing summary judgment motions," with "defendant typically fil[ing] first and simultaneously with or in advance of filing submit[ting] supporting affidavits and indices").

[165] See, e.g., Miscavige v. IRS, slip op. at 3287 ("The plaintiff's early attempt in litigation of this kind to obtain a Vaughn Index . . . is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Frankenberry v. United States Dep't of Justice, No. 87-3284, slip op. at 2 (D.D.C. Feb. 23, 1988) (motion to compel Vaughn Index prior to summary judgment motion denied as premature); Covington & Burling v. Farm Credit Admin., No. 87-2017, slip op. at 1 (D.D.C. Oct. 23, 1987) (whether case warrants Vaughn Index is "question of fact that can only be determined" after dispositive motion is filed); Stimac v. United States Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) (motion to compel Vaughn Index denied as premature on ground that "filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents"); see also Government Accountability Project v. NRC, No. 87-2053, slip op. at 1 (D.D.C. Aug. 13, 1987) ("[U]ntil defendant files an answer this Court is unable to determine precisely what will be contested and whether a Vaughn Index is appropriate and proper."). But see also Rosenfeld v. United States Dep't of Justice, No. C-90-3576, slip op. at 18-19 (N.D. Cal. Feb. 18, 1992) (no "indication that the provision of material justifying claimed exemptions should be delayed until a dispositive motion has been filed by the government") (appeal pending); Providence Journal Co. v. United States Dep't of the Army, 769 F. Supp. 67, 69 (D.R.I. 1991) (contention that Vaughn Index must await dispositive motion found to be "insufficient and sterile" where agency "has not even indicated when it plans to file such a motion"); Hansen v. United States Dep't of the Air Force, No. 91-0099, slip op. at 3 (D.D.C. Apr. 15, 1991) (unfair to allow government months to prepare its case and then force plaintiff to formulate his entire case within two weeks).

[166] 5 U.S.C. § 552(a)(4)(B) (1988).

rule.[167] Where an agency meets its burden by means of sufficiently detailed affidavits, in camera review may be deemed unnecessary and inappropriate.[168] It has been held that "when agency affidavits are insufficiently detailed to permit meaningful review of exemption claims, and when evidence of agency bad faith is before the court," in camera inspection may be appropriate.[169] Most appellate courts have applied the same, or a very similar, standard for evaluating the necessity of in camera submissions.[170]

At the broad discretion of the trial judge, in camera examination can be ordered even if a Vaughn Index is filed.[171] This may occur where the record

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[167] See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("The in camera review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved . . . ."); Miscavige v. IRS, No. 92-8659, slip op. 3284, 3286 (11th Cir. Sept. 17, 1993) (in camera review "is discretionary and not required, absent an abuse of discretion") (to be published); Ingle v. Department of Justice, 698 F.2d 259, 266 (6th Cir. 1983); see also PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993) (in camera review generally disfavored, but permissible on remand arising from inadequate affidavit); Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (in camera review, "though permitted under FOIA and sometimes necessary, is generally disfavored"); Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984) (in camera examination not substitute for government's obligation to provide detailed indexes and justifications); Cooley v. Department of the Navy, No. 85-1045, slip op. at 4 (D.D.C. Dec. 30, 1985) ("Considerations other than efficiency alone must dictate whether the judge should undertake an in camera inspection.").

[168] See, e.g., Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992); Silets v. United States Dep't of Justice, 945 F.2d 227, 229-32 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 2991 (1992); Vaughn v. United States, 936 F.2d 862, 869 (6th Cir. 1991) (in camera review "neither favored nor necessary where other evidence provides adequate detail and justification"); Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988); Brinton v. Department of State, 636 F.2d 600, 606 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981).

[169] Lam Lek Chong v. DEA, 929 F.2d 729 (D.C. Cir. 1991) (citing Carter v. United States Dep't of Commerce, 830 F.2d 388, 392 (D.C. Cir. 1987)); see, e.g., Dow Jones & Co. v. FBI, No. 85-0097, slip op. at 6-7/(D.D.C. Jan. 5, 1988) (in camera inspection ordered following submission of agency's second inadequate affidavit); cf. Silets v. United States Dep't of Justice, 945 F.2d at 231 (mere assertion, as opposed to actual evidence, of bad faith on part of agency found insufficient to warrant court's in camera review).

[170] See Silets v. United States Dep't of Justice, 945 F.2d at 229 (collecting cases).

[171] But see J.P. Stevens & Co. v. Perry, 710 F.2d 136, 142 (4th Cir. 1983) (district court's in camera inspection held to be error where Exemption 7(A)

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in the case is too vague or the agency's claims of exemption are too sweeping.[172] In camera inspection is also appropriate where the description of withheld information in the Vaughn Index conflicts with other public agency statements regarding the nature of the material withheld.[173] However, an agency should first have an opportunity to submit its public affidavit.[174] Nevertheless, by conducting in camera inspection, a district court necessarily establishes an adequate factual basis for determining the applicability of the claimed exemptions, regardless of the adequacy of an agency's affidavit.[175]

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[171](...continued)
Vaughn affidavit was sufficient to show "interference" category-by-category); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 87-88 (2d Cir. 1979) (in camera inspection order found to be abuse of discretion); Norwood v. FAA, No. 83-2315, slip op. at 15-16 (W.D. Tenn. Dec. 11, 1991) (proffered in camera inspection rejected where "extensive declarations submitted . . . provide sufficient information to enable the Court to rule on the application of the asserted FOIA exemptions"), aff'd in part, rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993).

[172] King v. United States Dep't of Justice, 830 F.2d 210, 225 (D.C. Cir. 1987); see, e.g., Weissman v. CIA, 565 F.2d 692, 697-98 (D.C. Cir. 1977); Miscavige v. IRS, No. CV-91-3721, slip op. at 8-9 (C.D. Cal. Dec. 9, 1992); Dow Jones & Co. v. FBI, slip op. at 6-7; Struth v. FBI, 673 F. Supp. 949, 956 (E.D. Wis. 1987).

[173] See, e.g., Mehl v. EPA, No. 90-1377, slip op. at 9-10 (D.D.C. Aug. 26, 1992).

[174] See Ingle v. Department of Justice, 698 F.2d at 264 ("'In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that "it can't hurt".'" (quoting Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978))); Hoch v. CIA, 593 F. Supp. 675, 680 (D.D.C. 1984) ("In camera proceedings are a last resort . . . particularly in national security situations."), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (table cite); Schlesinger v. CIA, 591 F. Supp. 60, 67-68 (D.D.C. 1984) (selective in camera review undertaken in Exemption 1 case to determine whether classification and agency justifications for withholding were proper where public disclosure would compromise national security); see also Meeropol v. Meese, 790 F.2d 942, 958-59 (D.C. Cir. 1986) (upholding district court decision to sample only one percent of voluminous documents).

[175] National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988); see City of Va. Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993) ("By conducting in camera review, the district court established an adequate basis for its decision."). Contra Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) ("In camera review of the withheld documents by the court is not an acceptable substitute for an adequate Vaughn index."), cert. denied, 112 S. Ct. 3013 (1992).

Although there is no per se rule requiring in camera inspection,[176] it has been found to be appropriate where only a small volume of records is involved,[177] and where it is the only method by which the district court could properly review a privacy claim under Exemption 6.[178] Similarly, where a discrepancy exists between representations in the Vaughn Index and other material that the agency has publicly disclosed, in camera inspection has been held to be an appropriate method by which to resolve that inconsistency.[179] Additionally, an in camera description of a sample of a larger number of documents has been found appropriate where national security concerns make detailed, public affidavits impracticable.[180] On the other hand, it has been held that in camera review is not a procedure to be employed as a means of determining whether a requester should be charged duplication fees.[181]

In limited circumstances, in camera, ex parte, oral testimony may be

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[176] See Young v. CIA, 972 F.2d at 539 ("this rule would eviscerate the discretion Congress gave district courts in section 552(a)(4)(B)"); Vaughn v. United States, 936 F.2d at 868-69; Center for Auto Safety v. EPA, 731 F.2d 16, 20 (D.C. Cir. 1984) (in camera inspection not required under Exemption 5).

[177] See Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993); Carter v. United States Dep't of Commerce, 830 F.2d at 393; Currie v. IRS, 704 F.2d 523, 531 (11th Cir. 1983); Allen v. CIA, 636 F.2d 1287, 1291-92 (D.C. Cir. 1980); Simon v. United States Dep't of Justice, No. 89-2117, slip op. at 4 (D.D.C. Sept. 14, 1990); see also Agee v. CIA, 517 F. Supp. 1335, 1336 (D.D.C. 1981) (selective in camera review). But see Young v. CIA, 972 F.2d at 549 (rejecting per se rule which would require in camera review "whenever the examination could be completed quickly").

[178] See Public Citizen Health Research Group v. United States Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978); see also Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (in camera inspection of classified affidavit appropriate where "[d]isclosure of the details . . . might result in serious consequences to the nation's security"). But see Landfair v. United States Dep't of the Army, No. 85-1421, slip op. at 9-10 (D.D.C. Mar. 27, 1986) (no in camera inspection necessary "irrespective of the number of documents involved" where affidavits appear adequate).

[179] See Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992).

[180] See, e.g., Wilson v. CIA, No. 89-3356, slip op. at 5-6 (D.D.C. Oct. 15, 1991) (50-document sample of approximately 1000 pages withheld in whole or in part, selected equally by parties, for in camera explanation); Wilson v. Department of Justice, No. 87-2415, slip op. at 4 (D.D.C. June 13, 1991) (sample of eight of approximately 80 withheld documents, to be selected equally by each side, for detailed in camera description). But cf. Lame v. United States Dep't of Justice, 654 F.2d 917, 927 (3d Cir. 1981) (in camera sampling of criminal law enforcement documents held insufficient).

[181] See Larson v. United States Dep't of Justice, No. 85-2991, slip op. at 2 (D.D.C. Sept. 30, 1986).

permitted, particularly in cases where documents contain national security information, because providing a more informative public description of the documents would risk revealing the very information the agency states is exempt from disclosure under the FOIA.[182] When in camera testimony is taken, however, it should be transcribed and maintained under seal.[183]

Summary Judgment

Summary judgment is the procedural vehicle by which virtually all FOIA cases are resolved.[184] Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which provides, in part, that the "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."[185] As long as there are no material facts at issue and no facts "susceptible to divergent inferences bearing upon an issue critical to disposition of the case," summary judgment is appropriate.[186] The Court of Appeals for the District of Columbia Circuit has held that "a motion for summary judgment adequately underpinned is not defeated simply by bare opinion or an unaided claim that a factual controversy persists."[187] In addition, "summary judgment need not be denied

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[182] See, e.g., Stein v. Department of Justice, 662 F.2d 1245, 1255 (7th Cir. 1981); Agee v. CIA, 517 F. Supp. at 1338; see also Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1469-71 (D.C. Cir. 1983); North Am. Man/Boy Love Ass'n v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,094, at 83,639 (S.D.N.Y. July 9, 1982), aff'd, 718 F.2d 1086 (2d Cir. 1983) (table cite).

[183] See Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983); Physicians for Social Responsibility v. United States Dep't of Justice, No. 85-0169, slip op. at 3-4 (D.D.C. Aug. 23, 1985); cf. Martin v. United States Dep't of Justice, No. 85-3091, slip op. at 3 (3d Cir. July 2, 1986) (nonexempt portion of in camera transcript ordered disclosed).

[184] See Struth v. FBI, 673 F. Supp. 949, 953 (E.D. Wis. 1987) ("Summary judgment is commonly used to adjudicate FOIA cases.").

[185] Fed. R. Civ. P. 56(c).

[186] Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 314 (D.C. Cir. 1988); see, e.g., Patterson v. IRS, No. 90-1941, slip op. at 3 (S.D. Ind. Nov. 3, 1992) ("[T]he disputed fact must be outcome determinative."); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 3-4 (D.D.C. Sept. 29, 1987); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 409-11 (D.D.C. 1983).

[187] Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 314 (footnote omitted); see also Duckworth v. Department of Navy, No. 91-15921, slip op. at 2 (9th Cir. Sept. 10, 1992) ("'Conclusory allegations unsupported by factual data will not create a triable issue of fact.'" (quoting Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978))); Gale v. FBI, 141 F.R.D. 94, 96 (N.D. Ill. 1992)

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automatically in the face of non-substantive factual disputes, such as those that are . . . 'metaphysical' in nature."[188]

In a FOIA case, the agency has the burden of justifying nondisclosure,[189] and it must sustain its burden through the submission of detailed affidavits which identify the documents at issue and explain why they fall under the claimed exemptions.[190] The widespread use of Vaughn Indexes, of course, means that affidavits, in the form of Vaughn Indexes, will nearly always be submitted in FOIA lawsuits, notwithstanding Rule 56's language making affidavits optional in general.

As one court has put it, "[s]ummary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester."[191] Summary judgment may be granted solely on the basis of agency affidavits if they are clear, specific and reasonably detailed, if they describe the

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[187](...continued)
(plaintiff's "own self-serving statements [alone] are insufficient to create a genuine issue of material fact barring summary judgment"); Lawyers Alliance for Nuclear Arms Control v. Department of Energy, No. 88-CV-7635, slip op. at 3-5 (E.D. Pa. Dec. 17, 1991) (plaintiff's reliance on "inadmissible hearsay" statements insufficient to preclude summary judgment where rebutted by government's "highly persuasive" sworn statements). But see Washington Post Co. v. HHS, 865 F.2d 320, 325-26 (D.C. Cir. 1989) (summary judgment found to be inappropriate, in Exemption 4 case, where affidavits conflicted on "critical factual issue" of whether government's information-gathering ability would be impaired by disclosure); Washington Post Co. v. United States Dep't of State, 840 F.2d 26, 29 (D.C. Cir. 1988) (summary judgment found to be inappropriate "when litigants quarrel over key factual premises"), vacated on petition for reh'g en banc, 898 F.2d 793 (D.C. Cir. 1989).

[188] Lombardo v. United States Dep't of Justice, No. 87-2652, slip op. at 2 (D.D.C. June 22, 1988); see In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992) ("speculation would not defeat the summary judgment motion"); Trenerry v. IRS, No. 90-C-444, slip op. at 3 (N.D. Okla. Jan. 7, 1992) ("plaintiff must do more than vituperatively hypothesize"), aff'd in pertinent part, rev'd in part & remanded in part sub nom. Trenerry v. Department of the Treasury, No. 92-5053, slip op. at 3-4 (10th Cir. Feb. 5, 1993).

[189] See, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 789 (D.D.C. 1992).

[190] See King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[191] Miller v. United States Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985).

withheld information in a factual and nonconclusory manner, and if there is no contradictory evidence on the record or evidence of agency bad faith.[192] If all of these requisites are met, such affidavits are usually accorded substantial weight by the courts.[193]

However, in a controversial two-to-one panel opinion, the D.C. Circuit indicated that, at least in the Exemption 4 context, it would give great weight to the rebuttal evidence of the requester and therefore require particular specificity in the affidavit of a company that submitted information to the FDA that both the agency and the company argued was protectible pursuant to Exemption 4.[194] In the event of a trial on a contested issue of fact, it will be decided by a judge alone because a FOIA requester is "not entitled to a jury trial."[195]

In certain circumstances, opinions or conclusions may be asserted in agency affidavits, especially in cases in which disclosure would compromise national security.[196] On the other hand, "[c]ourts have consistently held that a

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[192] See, e.g., Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Hemenway v. Hughes, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (in FOIA cases, summary judgment does not hinge on existence of genuine issue of material fact, but rather on basis of agency affidavits if they are reasonably specific, demonstrate logical use of exemptions and are not controverted by evidence in record or by bad faith) (applying standard developed in national security context to Exemption 6); see also In re Wade, 969 F.2d at 246 ("Without evidence of bad faith, the veracity of the government's submissions regarding reasons for withholding the documents should not be questioned.").

[193] See, e.g., Gardels v. CIA, 689 F.2d 1100, 1104 (D.C. Cir. 1982); Taylor v. Department of the Army, 684 F.2d 99, 106-07 (D.C. Cir. 1982); Schreibman v. United States Dep't of Commerce, 785 F. Supp. 164, 165 (D.D.C. 1991).

[194] See Greenberg v. FDA, 803 F.2d 1213, 1217-18 (D.C. Cir. 1986) (plaintiff "introduced evidence that placed material issues of fact in dispute"); see also Washington Post Co. v. HHS, 865 F.2d at 325-26 ("competing experts' affidavits as to the effect of disclosure" held to constitute "genuinely controverted factual issue" under Exemption 4); MCI Telecommunications Corp. v. GSA, No. 89-746, slip op. at 15-16 (D.D.C. Mar. 25, 1992) ("fact-intensive question" under Exemption 4 as to whether disclosure will cause submitter competitive harm precludes summary judgment).

[195] Clarkson v. IRS, No. 8:88-3036, slip op. at 8 (D.S.C. May 10, 1990).

[196] See Gardels v. CIA, 689 F.2d at 1106 (there is "necessarily a region for forecasts in which informed judgment as to potential harm should be respected"); Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980) ("courts must take into account . . . that any affidavit of threatened harm to national security will always be speculative"); Hoch v. CIA, 593 F. Supp. 675, 683-84 (D.D.C. 1984), aff'd, 807 F.2d 1227 (D.C. Cir. 1990) (table cite); see also Moore v. FBI, No. 83-1541, slip op. at 2 (D.D.C. Aug. 30, 1984) (FBI sufficiently identified "particular incident" given national security nature of documents), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite).

requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency when the agency possessing the relevant expertise has provided sufficiently detailed affidavits."[197]

Rule 56(e) of the Federal Rules of Civil Procedure provides that the affidavit must be based upon the personal knowledge of the affiant, must demonstrate the affiant's competency to testify as to matters stated, and must set forth only facts which would be admissible in evidence. (A federal statute specifically permits unsworn declarations (i.e., without notarizations) to be utilized in all cases in which affidavits otherwise would be required.[198]) "Gratuitous recitations of the affiant's own interpretation of the law," however, are inappropriate.[199]

In FOIA cases, the affidavit of an agency official who is knowledgeable about the way in which information is processed should satisfy the personal knowledge requirement.[200] Similarly, in instances in which an agency's search is questioned, an affidavit of an agency employee responsible for coordinating the search efforts should be sufficient to fulfill the personal knowledge

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[197] Struth v. FBI, 673 F. Supp. at 954; see, e.g., Goldberg v. United States Dep't of State, 818 F.2d 71, 78-79 (D.C. Cir. 1987) (under Exemption 1), cert. denied, 485 U.S. 904 (1988); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1289 (4th Cir. 1987) (under Exemption 7(A)); Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987) (under Exemption 7(A)); Gardels v. CIA, 689 F.2d at 1106 n.5 (under Exemptions 1 and 3); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 410-11 (under Exemptions 2 and 7(E)); see also Lindsey v. NSC, No. 84-3897, slip op. at 3 (D.D.C. July 12, 1985) (plaintiff cannot defeat summary judgment by saying that he will raise genuine issue "at a time of his own choosing").

[198] 28 U.S.C. § 1746 (1988); see Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993).

[199] Alamo Aircraft Supply, Inc. v. Weinberger, No. 85-1291, slip op. at 3 (D.D.C. Feb. 21, 1986).

[200] See, e.g., Spannaus v. United States Dep't of Justice, 813 F.2d at 1289 (declarant's attestation "to his personal knowledge of the procedures used in handling [the] request and his familiarity with the documents in question" held sufficient); Coleman v. FBI, No. 89-2773, slip op. at 8-9 (D.D.C. Dec. 10, 1991) ("The law does not require the affiant preparing a Vaughn Index to be personally familiar with more than the procedures used in processing the particular request."), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); United States Student Ass'n v. CIA, 620 F. Supp. 565, 567-68 (D.D.C. 1985); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 55-56 (D.D.C. 1983) (affiant competent where observations based on review of investigative report and upon general familiarity with the nature of investigations similar to that documented in requested report), aff'd, 772 F.2d 919 (D.C. Cir. 1984); Founding Church of Scientology v. Levi, 579 F. Supp. 1060, 1064 (D.D.C. 1982); Ramo v. Department of the Navy, 487 F. Supp. 127, 130 (N.D. Cal. 1979), aff'd, 692 F.2d 765 (9th Cir. 1982) (table cite).

requirement.[201] Likewise, in justifying the withholding of classified information under Exemption 1, the affiant is required only to possess document-classification authority for the records in question, not personal knowledge of the particular substantive area that is the subject of the request.[202] However, affiants must establish that they are personally familiar with all of the withheld records,[203] and should not be selected merely because they occupy a particular position in the agency.[204]

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[201] See, e.g., Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); Meeropol v. Meese, 790 F.2d 942, 951 (D.C. Cir. 1986) (supervisor/affiant properly relied on information provided by personnel who actually performed search); Carney v. United States Dep't of Justice, No. 92-CV-6204, slip op. at 12 (W.D.N.Y. Apr. 27, 1993) ("There is no basis in either the statute or the relevant caselaw to require that an agency effectively establish by a series of sworn affidavits a 'chain of custody' over its search process. The format of the proof submitted by defendant--declarations of supervisory employees, signed under penalty of perjury--is sufficient for purposes of both the statute and Fed.R.Civ.P. 56.") (appeal pending); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (where third party claimed to have knowledge of additional documents, affidavit of agency employee who contacted that party found sufficient); Pennsylvania Dep't of Pub. Welfare v. HHS, No. 84-690, slip op. at 3-4 (M.D. Pa. Nov. 10, 1985) (affidavits of supervisory officials who directed search held adequate); cf. Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (while agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor, affidavit must specifically describe search).

[202] Holland v. CIA, No. 91-1233, slip op. at 15-16 (D.D.C. Aug. 31, 1992); McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 8-9 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

[203] See Sellar v. FBI, No. 84-1611, slip op. at 3 (D.D.C. July 22, 1988).

[204] See Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,975 n.9 (D.D.C. June 24, 1983) (affiant merely sampled documents that staff had reviewed for him).

Discovery

Discovery is greatly restricted in FOIA actions.[205] It is generally limited to the scope of an agency's search,[206] its indexing and classification procedures, and similar factual matters.[207] Discovery may also be appropriate when the plaintiff can raise sufficient question as to the agency's good faith in processing or in its search.[208] However, in all cases, determinations of wheth-

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[205] Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 3 (D.D.C. Mar. 2, 1993) ("In the context of FOIA cases, discovery is generally inappropriate."); see In re Shackelford, No. 93-25, slip op. at 1 (D.D.C. Feb. 19. 1993) ("plaintiff's effort to depose two former FBI agents, now retired, concerning the purpose and conduct of the investigation of John Lennon over 20 years ago, is beyond the scope of allowable discovery in a [FOIA] action").

[206] Weisberg v. United States Dep't of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980) (discovery appropriate to inquire into adequacy of document search); Exxon Corp. v. FTC, 384 F. Supp. 755, 760 (D.D.C. 1974) (discovery limited to adequacy of search for identifiable records).

[207] Church of Scientology v. IRS, 137 F.R.D. 201, 202 (D. Mass. 1991); Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980); see Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 1-2 (D.D.C. Aug. 2, 1990) (permitting discovery, in Exemption 7(B) case, on issue of whether it is more probable than not that disclosure would seriously interfere with fairness of pending or "truly imminent" trial or adjudication); Silverberg v. HHS, No. 89-2743, slip op. at 2-3 (D.D.C. June 26, 1990) (permitting discovery, in Exemption 4 case, of responses by private drug-testing laboratories to agency's inquiry concerning whether their "performance test results" are customarily released to public); ABC v. USIA, 599 F. Supp. 765, 768-70 (D.D.C. 1984) (agency head ordered to submit to deposition on issue of whether transcripts of tape-recorded telephone calls constitute "personal records" or "agency records"). But see also Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (discovery may be permitted to determine whether complete disclosure was made and whether exemptions properly applied).

[208] See, e.g., Church of Scientology v. IRS, 991 F.2d 560, 563 (9th Cir. 1992) (finding abuse of discretion in district court's denial of discovery in light of "the special disadvantages facing this FOIA plaintiff," including "the questionable sufficiency of the Vaughn Index, the apparent evasiveness of the IRS responses [and] the slim showing of a need for as extensive a cloak of secrecy as the Government claimed"); Armstrong v. Bush, 139 F.R.D. 547, 553 (D.D.C. 1991) (discovery permitted to test government's claim that request for electronically stored records "would place an unreasonable burden on the agency"); Van Strum v. EPA, 680 F. Supp. 349, 350-51 (D. Or. 1987) (discovery appropriate where documents received by anonymous source raise "valid concerns" of affiant's credibility and good faith of search); cf. Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992)

(continued...)

er discovery should be permitted--and, if so, the type and extent of such discovery--are vested in the sound discretion of the district court.[209]

Such factual issues can properly arise, if at all, only after the government moves for summary judgment and submits its supporting affidavits and memorandum of law.[210] For example, one court entered a protective order barring discovery until the defendant had an opportunity to submit a second Vaughn affidavit, even after the court had found that the agency's affidavit was insufficient to establish the adequacy of the agency's search.[211] At least one court

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[208](...continued)
(discovery denied where "[p]laintiff has not offered any evidence to rebut the presumption of good faith that is accorded to [defendant's affidavit detailing its search]").

[209] North Carolina Network for Animals, Inc. v. United States Dep't of Agric., No. 90-1443, slip op. at 12 (4th Cir. Feb. 5, 1991) ("The district court should exercise its discretion to limit discovery in this as in all FOIA cases, and may enter summary judgment on the basis of agency affidavits when they are sufficient to resolve issues . . . ."); see, e.g., Trenerry v. United States Dep't of Treasury, No. 92-5053, slip op. at 10 (10th Cir. Feb. 5, 1993); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Gillin v. IRS, 980 F.2d 819, 823 (1st Cir. 1992) (per curiam); Nolan v. United States Dep't of Justice, 973 F.2d 843, 849 (10th Cir. 1992); Meeropol v. Meese, 790 F.2d 942, 960-61 (D.C. Cir. 1986); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

[210] See, e.g., Miscavige v. IRS, No. 92-8659, slip op. 3284, 3287 (11th Cir. Sept. 17, 1993) ("The plaintiff's early attempt in litigation of this kind . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions.") (to be published); Farese v. United States Dep't of Justice, No. 83-938, slip op. at 6 (D.C. Cir. Aug. 12, 1987) (affirming denial of discovery filed prior to affidavits because discovery "sought to short-circuit the agencies' review of the voluminous amount of documentation requested"); Simmons v. United States Dep't of Justice, 796 F.2d 709, 711-12 (4th Cir. 1986); Military Audit Project v. Casey, 656 F.2d 724, 750 (D.C. Cir. 1981); Church of Scientology v. IRS, 137 F.R.D. at 202; Stone v. FBI, No. 87-1346, slip op. at 2 (D.D.C. Jan. 19, 1988); Ferri v. Department of Justice, No. 86-1279, slip op. at 2 (D.D.C. Oct. 3, 1986); Citizens for Envtl. Quality, Inc. v. United States Dep't of Agric., No. 83-3763, slip op. at 2 (D.D.C. May 24, 1984), summary judgment granted, 602 F. Supp. 534 (D.D.C. 1984); Murphy v. FBI, 490 F. Supp. at 1137; Diamond v. FBI, 487 F. Supp. 774, 777-78 (S.D.N.Y. 1979), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984).

[211] Founding Church of Scientology v. United States Marshals Serv., 516 F. Supp. 151, 156 (D.D.C. 1980). But see Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 2 (D.D.C. July 27, 1988) (plaintiff permitted discovery on issue of due diligence even prior to filing of government's affidavits);
(continued...)

has afforded a higher standard for Exemption 1 cases, stating the "[i]t would be inappropriate to open this up to inadvertent statements by . . . a deponent in a national security area."[212] In any event, the "trial court has broad discretion . . . to stay discovery until preliminary questions that may dispose of the case are determined."[213]

A FOIA plaintiff should not in any case be permitted to extend his discovery efforts into the agency's thought processes for claiming particular exemptions.[214] Moreover, discovery should not be permitted where a plaintiff seeks thereby to obtain the contents of withheld documents, the issue that lies at the very heart of a FOIA case.[215] Nevertheless, in one Exemption 4 case the court permitted the plaintiff's counsel to review an in camera submission, sub-

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[211](...continued)
Shurberg Broadcasting of Hartford, Inc. v. FCC, 617 F. Supp. 825, 832 (D.D.C. 1985) (court permitted discovery after receiving Vaughn affidavit and determining that there was a genuine issue as to thoroughness of agency's search); Exxon Corp. v. FTC, 384 F. Supp. 755, 758-60 (D.D.C. 1974) (court permitted discovery by interrogatories when affidavits raised questions regarding adequacy of search, but denied further discovery after answers to interrogatories, together with entire record in case, resolved such questions), remanded, 527 F.2d 1386 (D.C. Cir. 1976) (table cite).

[212] McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 8 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987) (table cite).

[213] Petrus v. Brown, 833 F.2d 581, 583 (5th Cir. 1987) (granting stay of discovery pending determination of proper party defendant).

[214] See Pearson v. Bureau of Alcohol, Tobacco & Firearms, No. 85-3079, slip op. at 1-2 (D.D.C. Sept. 22, 1986); Murphy v. FBI, 490 F. Supp. at 1136 (citing United States v. Morgan, 313 U.S. 409, 422 (1941)).

[215] See, e.g., Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d at 1179 (plaintiff not entitled to discovery which would be tantamount to disclosure of contents of exempt documents); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (discovery denied where directed to substance of withheld documents at issue); Curcio v. FBI, No. 89-941, slip op. at 3-4 (D.D.C. Mar. 6, 1990) (same); Moore v. FBI, No. 83-1541, slip op. at 6 (D.D.C. Mar. 9, 1984) (court denied discovery requests which "would have to go to the substance of the classified materials" at issue, noting that "[t]his is precisely the case when the court can and should exercise its discretion to deny that discovery"), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 56 (D.D.C. 1983) (objections to interrogatories sustained where answers would "serve to confirm or deny the authenticity of the document held by plaintiff"), aff'd, 772 F.2d 919 (D.C. Cir. 1984); cf. Indiana Coal Council v. Hodel, 118 F.R.D. 264, 265-66 (D.D.C. 1988) (discovery of legal research system barred as a request for law, not factual information). But cf. Public Citizen v. EPA, No. 86-0316, slip op. at 7 (D.D.C. Oct. 16, 1986) ("While plaintiff has no right to material about deliberative processes, it at the least has a right . . . to know if the material it seeks justifies a deliberative process privilege.").

ject to the terms of a restrictive protective order.[216]

Discovery also should not be permitted where the plaintiff is plainly using the FOIA lawsuit as a means of questioning investigatory action taken by the agency or the underlying reasons for undertaking such investigations.[217] Courts will refuse to "allow [a] plaintiff to use this limited discovery opportunity as a fishing expedition [for] investigating matters related to separate lawsuits."[218]

Discovery should be denied altogether if the court is satisfied from the agency's affidavits that no factual dispute remains,[219] and where the affidavits are "relatively detailed" and submitted in good faith.[220] Consequently, discovery should routinely be denied when the plaintiff's "efforts are made with [nothing] more than a 'bare hope of falling upon something that might impugn the affidavits'" submitted by the defendant agency.[221] In any event, curtailment of discovery is particularly appropriate where the court takes in camera inspec-

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[216] Lederle Lab. v. HHS, No. 88-249, slip op. at 1 (D.D.C. May 2, 1988).

[217] See Williams v. FBI, No. 90-2299, slip op. at 7-8 (D.D.C. Aug. 6, 1991); Donohue v. United States Dep't of Justice, No. 84-3451, slip op. at 4 (D.D.C. May 16, 1986); see also Frydman v. Department of Justice, No. 78-4257, slip op. at 3-4 (D. Kan. Jan. 3, 1990) (discovery concerning electronic surveillance investigative practices denied).

[218] Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 4 (D.D.C. Nov. 12, 1987) (discovery limited to determination of FOIA issues, not to underlying personnel decision); see also Morrison v. United States Dep't of Justice, No. 87-3394, slip op. at 4 (D.D.C. Apr. 29, 1988) (denying depositions and refusing to "sanction a fishing expedition" where plaintiff argued newspaper article evidenced waiver of Exemption 5, but article actually "raise[d] precisely the opposite inference").

[219] Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), vacated in part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980); see also Stone v. FBI, slip op. at 2.

[220] See SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991) (affirming decision to deny discovery as to adequacy of search on ground that agency's affidavits were sufficiently detailed); Military Audit Project v. Casey, 656 F.2d at 751 (affirming trial court's refusal to permit discovery where plaintiffs had failed to raise "substantial questions concerning the substantive content of the [defendants'] affidavits"); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 n.3 (D.D.C. July 12, 1991) (plaintiff's "conjecture and unsupported allegation" that agency has "motive" to prevent release of responsive records held insufficient basis for discovery concerning adequacy of search); see also Gardels v. CIA, 689 F.2d 1100, 1106 & n.5 (D.C. Cir. 1982); Murphy v. FBI, 490 F. Supp. at 1136-37.

[221] Center for Nat'l Sec. Studies v. Office of Indep. Counsel, slip op. at 5 (quoting Founding Church of Scientology v. NSA, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)); see Military Audit Project v. Casey, 656 F.2d at 751-52.

inspection.[222]

Finally, it should be noted that in appropriate cases, the government can conduct discovery against the requester,[223] but there is no jurisdiction under the FOIA to permit either party to take discovery against a private citizen.[224]

Waiver of Exemptions in Litigation

As noted above, the FOIA directs district courts to review agency actions de novo.[225] Thus, an agency is not barred from invoking a particular exemption in litigation merely because that exemption was not cited in responding to the request at the administrative level.[226]

Failure to raise an exemption in a timely fashion in litigation at the district court level, however, may result in a waiver. Although an agency should not be required to plead its exemptions in its answer,[227] it has been held that

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[222] See Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (in camera review, rather than discovery, employed to resolve inconsistency between representations in Vaughn Index and agency's prior public statements); Laborers' Int'l Union v. United States Dep't of Justice, 772 F.2d at 921.

[223] See In re Engram, No. 91-1722, slip op. at 6-7 (4th Cir. June 2, 1992) (per curiam) (discovery regarding how plaintiff obtained defendant's document permitted as relevant to issue of waiver under Exemption 5); Weisberg v. United States Dep't of Justice, 749 F.2d 864, 868 (D.C. Cir. 1984).

[224] See Kurz-Kasch, Inc. v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986).

[225] 5 U.S.C. § 552(a)(4)(B) (1988).

[226] See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992); Gula v. Meese, 699 F. Supp. 956, 959 n.2 (D.D.C. 1988); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1370-71 (E.D.N.C. 1986); Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1236 (N.D. Ill. 1982); Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite); see also Conoco Inc. v. United States Dep't of Justice, 521 F. Supp. 1301, 1306 (D. Del. 1981) (agency is not barred from asserting work-product claim under Exemption 5 merely because it had not acceded to plaintiff's demand for Vaughn Index at administrative level), aff'd in part, rev'd in part & remanded, 687 F.2d 724 (3d Cir. 1982). But cf. AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (in "reverse" FOIA context--where standard of review is "arbitrary [and] capricious" based upon "whole" administrative record--agency may not initially offer at litigation stage its reasons for refusal to withhold material); Gilday v. United States Dep't of Justice, No. 85-292, slip op. at 5 (D.D.C. July 22, 1985) (agency rationale asserted in litigation over denial of fee waiver cannot correct shortcomings of administrative record).

[227] See, e.g., Johnson v. Federal Bureau of Prisons, No. 90-H-645-E, slip

(continued...)

"'agencies [may] not make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.'"[228] Thus, an agency's failure to preserve its exemption claims can lead to serious waiver consequences as FOIA litigation progresses, not only during the initial district court proceedings,[229] but also at the appellate level,[230] and even following a remand.[231]

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[227](...continued)
op. at 4-5 (N.D. Ala. Nov. 1, 1990); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. at 1371; Berry v. Department of Justice, 612 F. Supp. 45, 47 (D. Ariz. 1985); see also American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 206-07 (D.C. Cir. 1990). But see Ray v. United States Dep't of Justice, 908 F.2d 1549, 1557 (11th Cir. 1990) (going so far as to suggest that all exemptions must be raised by defendant agency "'in a responsive pleading'" (quoting Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982))), rev'd on other grounds sub nom. United States Dep't of State v. Ray, 112 S. Ct. 541 (1991).

[228] Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980), vacated in part as moot, 455 U.S. 997 (1982)).

[229] See, e.g., Ray v. United States Dep't of Justice, 908 F.2d at 1551 (new exemption claims waived when raised for first time after district court ruled against government on its motion for summary judgment); Miller v. Sessions, No. 77-C-3331, slip op. at 2 (N.D. Ill. May 2, 1988) ("misunderstanding" on part of government counsel of court's order to submit additional affidavits held insufficient to overcome waiver; motion for reconsideration denied); Nishnic v. United States Dep't of Justice, No. 86-2802, slip op. at 2-3 (D.D.C. Oct. 20, 1987) (defendant's motion for reconsideration to present additional affidavits, exemptions and evidence under seal denied as defendant had "ample opportunity" to present all FOIA defenses at earlier stage of litigation); Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 4 (N.D. Cal. June 14, 1985) (government may not raise Exemption 7(D) for documents declassified during pendency of case when only Exemption 1 raised at outset).

[230] See, e.g., Jordan v. United States Dep't of Justice, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc) (refusing to consider government's Exemption 7 claim first raised in a "supplemental memorandum" filed one month prior to appellate oral argument).

[231] See, e.g., Fendler v. Parole Comm'n, 774 F.2d 975, 978 (9th Cir. 1985) (government barred from raising Exemption 5 on remand to protect presentence report because it was raised for first time on appeal); Ryan v. Department of Justice, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (government barred from invoking Exemption 6 on remand because it was raised for first time on appeal); see also Benavides v. United States Bureau of Prisons, 995 F.2d 269, 273 (D.C. Cir. 1993) ("[T]he government is not entitled to raise defenses to requests for information seriatim until it finds a theory that the court will accept, but must bring all its defenses at once before the district court.")
(continued...)

The effect of these holdings is somewhat mitigated by the Court of Appeals for the District of Columbia Circuit's observation in Jordan v. United States Department of Justice that if the government "through pure mistake" failed to assert the proper exemption in district court and the information involved was of a very sensitive nature and was "highly likely" to be protected by an exemption, then the appellate court would have discretion under 28 U.S.C. § 2106 to remand the case for such further proceedings "as may be just under the circumstances."[232]

Sometimes, changes in factual circumstances may dictate revisions of an agency's exemption position--for example, where an agency's Exemption 7(A) withholding is rendered moot by intervening factual developments.[233] Simi-

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[231](...continued)
(Privacy Act access case). Compare Washington Post Co. v. HHS, 795 F.2d 205, 208-09 (D.C. Cir. 1986) ("privilege" prong of Exemption 4 may not be raised for first time on remand--even though "confidential" prong was previously raised--absent sufficient extenuating circumstances) and Washington Post Co. v. HHS, 865 F.2d 320, 327 (D.C. Cir. 1989) (agency prohibited from raising new aspect of previously raised prong of Exemption 4) with Lame v. United States Dep't of Justice, 767 F.2d 66, 71 n.7 (3d Cir. 1985) (new exemptions may be raised first on remand, as compared to raising new exemptions on appeal).

[232] 591 F.2d at 780; see Ryan v. Department of Justice, 617 F.2d 781, 792 (D.C. Cir. 1980) (following Jordan, rejects exemption not raised at district court; no "extraordinary circumstances" to warrant relief under 28 U.S.C. § 2106); see also Oklahoma Publishing Co. v. HUD, No. 87-1935-P, slip op. at 4 (W.D. Okla. June 17, 1988) (because Exemption 6 found applicable to material originally ordered disclosed, court held exemption not waived--to protect subject--but imposed sanctions on defendant and counsel); Washington Post Co. v. DOD, No. 84-2402, slip op. at 5 (D.D.C. Apr. 11, 1988) (permitting agency to raise new Exemption 1 claim for records previously found not protected by Exemption 5, where disclosure "could compromise the nation's foreign relations or national security" (citing Jordan v. United States Dep't of Justice, 591 F.2d at 780)). But cf. Schanen v. United States Dep't of Justice, 798 F.2d 348, 349-50 (9th Cir. 1986) (although government's Rule 60(b) motion, based on procedural errors, was properly denied, government may withhold identities of informers and DEA agents due to possibility of imminent harm to those individuals; government subject to attorney fees, however).

[233] See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (government not barred from invoking other exemptions after reliance on Exemption 7(A) rendered untenable by conclusion of underlying law enforcement proceeding); Donovan v. FBI, 625 F. Supp. 808, 809 (S.D.N.Y. 1986) (same); accord Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 581 (making no "broad pronouncement" on whether conclusion of law enforcement proceedings used to justify Exemption 7(A) claim will always be sufficient factual change, court found, based upon showing of good faith by agency, that trial judge did not abuse discretion in allowing agency to advance other exemptions); see also
(continued...)

larly, an agency should be able to belatedly assert new defenses if there is "an interim development in applicable legal doctrine."[234]

In the district court, exemption claims should, of course, be substantiated by adequate Vaughn submissions. (See discussion of "Vaughn Index," above.) Failure to submit an adequate Vaughn affidavit, however, should not result in a waiver of exemptions and justify the granting of summary judgment against an agency.[235] The most prudent practice for agency defendants, though, is to ensure that their initial Vaughn affidavits contain detailed justifications of every

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[233](...continued)
Church of Scientology v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) ("If the investigation is open . . . at the time of the request, the documents are exempt. Furthermore, the agency is not required to monitor the investigation and release the documents once the investigation is closed and there is no reasonable possibility of future proceedings." (citing Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991))). But see Curcio v. FBI, No. 89-941, slip op. at 10-11 (D.D.C. Nov. 2, 1990) (government barred from raising new exemptions where it originally relied entirely upon Exemption 7(A)) (motion for reconsideration pending); cf. Washington Post Co. v. HHS, 795 F.2d at 208 (fact that court recommended in previous decision, in dicta, that HHS raise new argument could not be considered "extraordinary circumstance" that would justify actually raising argument on remand).

[234] Jordan v. United States Dep't of Justice, 591 F.2d at 780; see also Cotner v. United States Parole Comm'n, 747 F.2d 1016, 1018-19 (5th Cir. 1984) (new exemptions may be asserted when remand due to "fundamental" change in government's position "not calculated to gain any tactical advantage in this particular case"); Carson v. United States Dep't of Justice, 631 F.2d 1008, 1015 n.29 (D.C. Cir. 1980) (declining to preclude consideration of particular FOIA exemptions on remand where, in holding that presentence report was agency record of Parole Commission for purposes of FOIA, court was "embark[ing] upon previously uncharted territory"). But see Lykins v. Rose, 608 F. Supp. 693, 695 (D.D.C. 1984) ("interim developments" justification for new exemptions does not include losses in instant case or rejection of alternative defense).

[235] See Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 982 (3d Cir. 1981) (abuse of discretion to refuse to consider revised index and instead award "partial judgment" to plaintiff, even though corrected index was submitted one day before oral argument on plaintiff's "partial judgment" motion); cf. Wilkinson v. FBI, No. 80-1048, slip op. at 3 (C.D. Cal. June 17, 1987) (after providing government 30 days to further justify exemptions, and after reviewing those subsequent declarations, court found same faults with new declarations as with original ones and ordered in camera review). But see Carroll v. IRS, No. 82-3524, slip op. at 28 (D.D.C. Jan. 31, 1986) (holding affidavits insufficient and affording agencies no further opportunities to re-assert their claims; "[a]fter years of litigation, the suit must be resolved").

exemption planned to be asserted on the basis of all known facts.[236] By the same token, courts also have held that they will not consider issues raised for the first time on appeal by FOIA plaintiffs.[237]

Attorney Fees and Litigation Costs

The FOIA is one of more than 100 different federal statutes which contains a "fee-shifting" provision permitting the trial court to award reasonable attorney fees and litigation costs if the plaintiff has "substantially prevailed" in litigation.[238] This provision, added as part of the 1974 FOIA amendments, requires courts to engage in a two-step substantive inquiry: (1) Is the plaintiff eligible for an award of fees and/or costs? (2) If so, is the plaintiff entitled to it?[239] The award of fees is discretionary with the court, once the threshold of eligibility has been crossed.[240]

As a preliminary matter, it should be noted that 5 U.S.C. § 552(a)(4)(E)

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[236] See Coastal States Gas Corp. v. Department of Energy, 644 F.2d at 981 (suggesting that agencies might be restricted to one index); see also ABC v. USIA, 599 F. Supp. 765, 768 (D.D.C. 1984) (flatly denying government's request to first litigate "agency record" issue and to raise other exemptions only if threshold defense fails).

[237] See, e.g., Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987) (in camera inspection of records not considered when raised for first time on appeal); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 983 (1st Cir. 1985) (appointment of counsel not considered when raised for first time on appeal); Bush v. Webster, No. 85-4262, slip op. at 2-3 (5th Cir. Feb. 10, 1986) (government's lack of expeditious handling of case raised for first time on appeal); Kimberlin v. United States Dep't of the Treasury, 774 F.2d 204, 207 (7th Cir. 1985) (issue of deletions taken pursuant to FOIA exemptions raised for first time on appeal). But see Carter v. United States Dep't of Commerce, 830 F.2d 388, 390 n.8 (D.C. Cir. 1987) (appellate court sua sponte considered new theories of public interest in its Exemption 6 balancing not raised by plaintiff at district court); Farese v. United States Dep't of Justice, No. 86-5528, slip op. at 9-10 (D.C. Cir. Aug. 12, 1987) (plaintiff not estopped from challenging use of specific exemptions at appellate stage where he merely argued at trial level that agency failed to meet its burden of establishing documents exempt).

[238] 5 U.S.C. § 552(a)(4)(E) (1988).

[239] See Tax Analysts v. United States Dep't of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992); Church of Scientology v. United States Postal Serv., 700 F.2d 486, 489 (9th Cir. 1983).

[240] See, e.g., Young v. Director, CIA, No. 92-2561, slip op. at 4 (4th Cir. Aug. 10, 1993); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1094 ("sifting of [fee] criteria over the facts of a case is a matter of district court discretion"); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1495 (D.C. Cir. 1984); Church of Scientology v. United States Postal Serv., 700 F.2d at 489.

provides for the assessment of fees and costs reasonably incurred in litigating an action under the FOIA. Accordingly, fees and other costs may not be awarded for services rendered at the administrative level.[241] Similarly, fees are not recoverable for services rendered in related rulemaking proceedings.[242]

The vast majority of courts have held that 5 U.S.C. § 552(a)(4)(E) does not authorize the award of fees to a pro se nonattorney.[243] Previously, only the Court of Appeals for the District of Columbia Circuit had unqualifiedly approved the award of fees to pro se nonattorney litigants.[244] Following the Supreme Court's decision in Kay v. Ehrler,[245] however, the D.C. Circuit concluded in Benavides v. Bureau of Prisons, that it was "constrained" to reverse its position.[246] It observed that "absent congressional intent to the contrary, the Supreme Court believes that the word 'attorney,' when used in the context of a fee-shifting statute, does not encompass a layperson proceeding on his own behalf."[247] In rejecting the plaintiff's contention that the "the fee provision in

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[241] See Newport Aeronautical Sales v. Department of the Navy, No. 84-120, slip op. at 8 (D.D.C. Apr. 17, 1985); Associated Gen. Contractors v. EPA, 488 F. Supp. 861, 864 (D. Nev. 1980); cf. Kennedy v. Andrus, 459 F. Supp. 240, 244 (D.D.C. 1978) (no fees for services rendered at administrative level under Privacy Act of 1974), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (table cite). But see Mahler v. IRS, No. 79-3238, slip op. at 1 (D.D.C. Mar. 28, 1980) (one-page order granting pro se plaintiff's unopposed motion for attorney fees for work done at administrative level).

[242] See Newport Aeronautical Sales v. Department of the Navy, slip op. at 8; see also Nichols v. Pierce, 740 F.2d 1249, 1252-54 (D.C. Cir. 1984) (no fees awarded where plaintiff was successful in APA rulemaking action in which FOIA had not been referenced or primarily relied upon).

[243] See, e.g., Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986); DeBold v. Stimson, 735 F.2d 1037, 1041-43 (7th Cir. 1984); Wolfel v. United States, 711 F.2d 66, 68 (6th Cir. 1983); Clarkson v. IRS, 678 F.2d 1368, 1371 (11th Cir. 1982); Cunningham v. FBI, 664 F.2d 383, 384-88 (3d Cir. 1981); Barrett v. Bureau of Customs, 651 F.2d 1087, 1089 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982); Crooker v. United States Dep't of Justice, 632 F.2d 916, 920-21 (1st Cir. 1980); Burke v. Department of Justice, 432 F. Supp. 251, 253 (D. Kan. 1976), aff'd, 559 F.2d 1182 (10th Cir. 1977); cf. Crooker v. EPA, 763 F.2d 16, 17 (1st Cir. 1985) (pro se FOIA plaintiff may not collect fees under Equal Access to Justice Act).

[244] See Cox v. United States Dep't of Justice, 601 F.2d 1, 5-6 (D.C. Cir. 1979); Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976), aff'd sub nom. Holly v. Chasen, 569 F.2d 160 (D.C. Cir. 1977) (table cite).

[245] 111 S. Ct. 1435, 1436-37 (1991) (holding that 42 U.S.C. § 1988 (1988), a fee-shifting statute similar to FOIA, does not authorize payment of fees to pro se attorney litigants).

[246] 993 F.2d 257, 259 (D.C. Cir. 1993).

[247] Id.

FOIA is designed principally to deter government noncompliance,"[248] the D.C. Circuit declared: "To the extent that the fee-shifting provision in FOIA helps deter violations of the law, that result is only a serendipitous by-product of encouraging aggrieved individuals to obtain an attorney."[249]

In the wake of Kay and Benavides, the scant residual authority approving attorney fees awards to a pro se plaintiff may be regarded as tenuous, at best. An earlier decision of the Court of Appeals for the Second Circuit implicitly held open the possibility of an award of attorney fees to a pro se litigant, although affirming the district court's denial of fees in that particular case.[250] In a subsequent decision, however, the Second Circuit appeared to retreat from even this equivocal position.[251]

Although in its decision in Benavides the D.C. Circuit specifically refused to comment on the availability of fees to pro se plaintiffs who are attorneys,[252] it should be noted that in Kay v. Ehrler, the Supreme Court specifically ruled that even a pro se attorney is ineligible for a fee award under 42 U.S.C. § 1988,[253] implicitly endorsing a line of cases that had reached the same conclusion under the FOIA.[254] It is significant that in Kay v. Ehrler, the Supreme Court employed reasoning virtually identical to that of Falcone v. IRS,[255] a FOIA decision upon which the district court in Kay v. Ehrler had

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[248] Id.; see also Sellers v. Bureau of Prisons, No. 93-5090, slip op. at 1 (D.C. Cir. July 27, 1993) (applying principle of Kay and Benavides to deny fees to prevailing pro se plaintiff in Privacy Act litigation).

[249] 993 F.2d at 260.

[250] Crooker v. United States Dep't of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980).

[251] See Kuzma v. United States Postal Serv., 725 F.2d 16, 17 (2d Cir.) (emphasizing that Crooker was limited decision in which court had merely "held out the possibility that a pro se litigant might be entitled to some fee award if he could show that he had foregone an opportunity to earn 'regular income for a day or more in order to prepare and pursue a pro se suit'" (quoting Crooker, 634 F.2d at 49)), cert. denied, 469 U.S. 831 (1984).

[252] 993 F.2d at 260.

[253] 111 S. Ct. at 1436-39.

[254] See, e.g., Aronson v. HUD, 866 F.2d 1, 4-6 (1st Cir. 1989) (denying fee awards for pro se attorney); Rotondo v. FBI, No. 88-3035, slip. op. at 2 (6th Cir. Aug. 24, 1988) (same); Falcone v. IRS, 714 F.2d 646, 647-48 (6th Cir. 1983) (same), cert. denied, 466 U.S. 908 (1984). But see Cazalas v. United States Dep't of Justice, 709 F.2d 1051, 1055-57 (5th Cir. 1983) (granting fee awards for pro se attorney); Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (same).

[255] 714 F.2d at 647-48.

relied in originally denying pro se attorney fees.[256]

Under the circumstances, it appears reasonable to conclude that the Supreme Court's rationale in Kay v. Ehrler would preclude an award of fees to any pro se FOIA litigant.[257] In the only post-Kay decision to address this issue thus far, the court reasoned: "Because substantially similar policies underlie the attorneys' fees provisions of FOIA and section 1988, Kay strongly supports a denial of fees under FOIA to pro se attorney plaintiffs."[258] The applicability of these principles to the FOIA is further buttressed by the Supreme Court's practice of construing similarly worded fee-shifting statutes "uniformly."[259] In contrast to the apparent prohibition against pro se fees, however, it has been firmly held that a state is eligible to recover attorney fees under the FOIA.[260]

Unlike with attorney fees, the law is settled that costs of litigation can be reasonably incurred by, and awarded to, even a pro se litigant who is not an attorney.[261] As the D.C. Circuit has noted, "[t]he fixing of costs, if any, is handled routinely under 28 U.S.C. § 1920."[262] More recently, "costs" in a

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[256] 111 S. Ct. at 1436-38 & n.4; see Benavides, 993 F.2d at 260 ("In discussing Falcone, the Supreme Court in Kay says absolutely nothing to suggest that . . . considerations affecting the disposition of fee claims under FOIA and section 1988 should be viewed differently.").

[257] See 111 S. Ct. at 1438 (observing that "awards of counsel fees to pro se litigants--even if limited to those who are members of the bar--would create a disincentive to employ counsel" and that "policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case").

[258] Manos v. United States Dep't of the Air Force, No. 92-3986, slip op. at 5-6 (N.D. Cal. Aug. 13, 1993) (recognizing prior split in circuits and even between district courts within Ninth Circuit regarding pro se attorney fee awards, but adopting blanket prohibition against such awards in light of Kay.).

[259] City of Burlington v. Dague, 112 S. Ct. 2638, 2641 (1992) ("[O]ur case law construing what is a 'reasonable' fee applies uniformly to all [similar fee statutes].").

[260] See, e.g., Texas v. ICC, 935 F.2d 728, 734 (5th Cir. 1991); Assembly of Cal. v. United States Dep't of Commerce, No. Civ-S-91-990, slip op. at 13-14 (E.D. Cal. May 28, 1993) ("Although the Assembly may have more resources than some private citizens, this does not mean the Assembly is any less restricted with respect to allocating its resources.")

[261] See Carter v. VA, 780 F.2d at 1481-82; DeBold v. Stimson, 735 F.2d at 1043; Clarkson v. IRS, 678 F.2d at 1371; Crooker v. United States Dep't of Justice, 632 F.2d at 921-22; see also Trenerry v. United States Dep't of Treasury, No. 92-5053, slip op. at 10-12 (10th Cir. Feb. 5, 1993).

[262] Gregory v. FDIC, 631 F.2d 896, 900 n.8 (D.C. Cir. 1980); see also (continued...)

FOIA case have been interpreted to include the fees paid to a special master appointed by the court to review documents on its behalf.[263] Of course, if it prevails, even the government may recover its costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.[264]

To be eligible for a fee award, the plaintiff must "substantially prevail" within the meaning of 5 U.S.C. § 552(a)(4)(E). The determination of whether the plaintiff has substantially prevailed is "largely a question of causation."[265] Though a court order compelling disclosure is not a condition precedent to an award of fees, the plaintiff must prove that prosecution of the suit was reasonably necessary to obtain the requested records and that a causal nexus existed between the suit and the agency's disclosure of the records.[266] The mere filing of the lawsuit and the subsequent release of records does not necessarily mean that the plaintiff substantially prevailed.[267] Indeed, eligibility for a fee

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[262](...continued)
Kuzma v. IRS, 821 F.2d 930, 931-34 (2d Cir. 1987) (finding that reimbursable costs included photocopying, postage, typing, parking and transportation expenses, in addition to filing costs and marshal's fees awarded at trial level).

[263] See Washington Post v. DOD, 789 F. Supp. 423, 424 (D.D.C. 1992) (apportioning master's fees equally between plaintiff and government).

[264] See, e.g., Donohue v. United States Dep't of Justice, No. 84-3451, slip op. at 1-2 (D.D.C. Mar. 7, 1988) (granting government's bill of costs for reimbursement of reporter, witness and deposition expenses); see also Baez v. United States Dep't of Justice, 684 F.2d 999, 1005-06 (D.C. Cir. 1982) (en banc) (assessing costs of appeal against unsuccessful plaintiff).

[265] Weisberg v. United States Dep't of Justice, 745 F.2d at 1496; Church of Scientology v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981).

[266] See, e.g., Maynard v. CIA, 986 F.2d at 568; Cox v. United States Dep't of Justice, 601 F.2d at 6 (citing Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976)); Cuneo v. Rumsfeld, 553 F.2d at 1366); cf. Transit Performance Eng'g v. Department of Transp., No. 92-722, slip op. at 4 (D.D.C. June 26, 1992) (no causation where "undisputed evidence [showed] that the officials who decided to release the documents were not even aware that a lawsuit had been filed until after the requested documents were released"); National Wildlife Fed'n v. Department of the Interior, No. 83-3586, slip op. at 9-12 (D.D.C. Aug. 19, 1988) (fees denied where plaintiffs failed to prove that suit played "catalytic role" in prompting Congress to amend FOIA fee waiver provision).

[267] See Maynard v. CIA, 986 F.2d at 568 (production of documents by two agencies after suit filed held "not determinative" as to causation); Weisberg v. United States Dep't of Justice, 745 F.2d at 1496; Frye v. EPA, No. 90-3041, slip op. at 8 (D.D.C. Aug. 31, 1992) ("while plaintiff's lawsuit appears to have served as a catalyst for EPA's eventual disclosures, it is not at all clear that it was the cause" of EPA's voluntary disclosure); see also Gray v. United States Dep't of Agric., No. 91-1383, slip op. at 3 (D.D.C. Mar. 27, 1992) (agency's
(continued...)

award may be lacking where the plaintiff could reasonably have obtained the same information through other means,[268] or where the release resulted from events independent of the lawsuit,[269] or where it was due to routine, though delayed, administrative processing.[270] Of course, if a requester unconditional-

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[267](...continued)
granting of fee waiver on administrative appeal after plaintiff "precipitously filed" court complaint--involving "new and time-consuming issue" in context of "blunderbuss request"--held insufficient to establish plaintiff as prevailing party).

[268] See, e.g., Murty v. OPM, 707 F.2d 815, 816 (4th Cir. 1983) ("telephone call of inquiry as to what had happened to his request . . . would have produced the same result as the law suit"); Palmer v. Sullivan, No. H-C-91-13, slip op. at 3 (E.D. Ark. July 8, 1991) (fees denied where "telephone call or follow-up letter could easily have avoided this lawsuit"); Mendez-Suarez v. Veles, 698 F. Supp. 905, 907 (N.D. Ga. 1988) (fees denied where "the pendency of the discovery requests conclusively demonstrates that the information sought was available through means other than the filing of a FOIA claim"); see also Nicolau v. United States Dep't of Justice, 699 F. Supp. 1063, 1066 (S.D.N.Y. 1988) (fees denied where "no reason to believe that the suit was necessary for the actions of the [agency] . . . [i]ndeed, it is not even clear that those individuals in the [agency] were aware of the suit at the time the documents were turned over").

[269] See, e.g., Ostrer v. FBI, No. 83-0328, slip op. at 12 (D.C. Cir. Jan. 19, 1988) (no causation where release of records was due to change in factual circumstances during course of litigation); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Justice, 750 F.2d 117, 119-21 (D.C. Cir. 1984) (release by senator of his letter to Attorney General held not caused by filing of FOIA suit); Public Law Educ. Inst. v. United States Dep't of Justice, 744 F.2d 181, 183-84 (D.C. Cir. 1984) (no causation where government exercised its discretion to release requested document in unrelated, non-FOIA suit); Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977) ("[W]here the government can show that information disclosed after initial resistance was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees."); Pfeiffer v. CIA, No. 87-1279, slip op. at 2-3 (D.D.C. Oct. 23, 1991) ("[P]ermitting attorneys' fees for the voluntary release of exempt material would have a chilling effect."). But see Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 4-5 (D. Ariz. Dec. 12, 1987) (fact that plaintiffs acquired documents independently does not preclude them from substantially prevailing; a "contrary determination is inconceivable as the government would be able to foreclose the recovery of attorney's fees whenever it chose to moot an action" by releasing records after having denied disclosure at administrative level).

[270] See, e.g., Van Strum v. EPA, No. 91-35404, slip op. at 5 (9th Cir. Aug. 17, 1992) (no causation where, in litigation, agency disclosed 18,000 pages within two months after narrowing of request); Weisberg v. United States Dep't of Justice, 848 F.2d 1265, 1268-71 (D.C. Cir. 1988) (no causation where (continued...)

ly waives his right to fees as part of a settlement, he cannot go back on his agreement.[271]

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[270](...continued)
majority of records were released as result of administrative processing and not suits); Varelli v. FBI, No. 88-1865, slip op. at 3-4 (D.D.C. July 13, 1992) (fees denied where disclosures resulted from "[t]he lengthy and thorough review of plaintiff's request [which] was initiated by the FBI well before the filing of this suit and proceeded throughout the pendency of the normal administrative process"); Arevalo-Franco v. INS, 772 F. Supp. 959, 961 (W.D. Tex. 1991) (requesters "generally" held not to have substantially prevailed when they "know that administrative problems are causing the delay . . . and file lawsuits anyway"); Alliance for Responsible CFC Policy, Inc. v. Costle, 631 F. Supp. 1469, 1470 (D.D.C. 1986) (fees denied where agency's "failure to disclose in timely fashion appears to be 'an unavoidable delay accompanied by due diligence in the administrative processes' and not the result of agency intransigence" (quoting Cox v. United States Dep't of Justice, 601 F.2d at 6)); Lovell v. Department of Justice, 589 F. Supp. 150, 153-54 (D.D.C. 1984) (fees denied even though plaintiff waited three years before filing suit and records were released only several months thereafter); Simon v. United States, 587 F. Supp. 1029, 1032 (D.D.C. 1984) (fees denied where "routine administrative inertia or unavoidable delay in identifying and assembling the information requested was the reason for defendants' belated compliance"); Bubar v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,218, at 83,930 (D.D.C. June 13, 1983) (fees denied even though over 5,400 pages of records released pursuant to revised processing procedures after suit filed, because plaintiff "failed to meet his burden of showing that the filing of this lawsuit caused the release of the additional documents"); Liechty v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 82,482, at 83,193 (D.D.C. Sept. 16, 1982) (fees denied where plaintiff "offer[ed] no evidence other than his conclusory allegations that the filing of this suit 'actually provoked' the release of the 424 documents provided by the CIA without an order of the court"). But see Northwest Coalition for Alternatives to Pesticides v. Reilly, No. 90-707, slip op. at 2-4 (D.D.C. May 28, 1992) (government's claim that disclosure was made in course of "administrative processing" rejected where agency failed to respond to plaintiff's letters of administrative appeal); Church of Scientology v. IRS, 769 F. Supp. 328, 330 (C.D. Cal. 1991) (notwithstanding agency appeal backlog, plaintiff eligible where government denied documents initially, had yet to respond to administrative appeal, and released documents only following order to produce Vaughn Index); Muffoletto v. Sessions, 760 F. Supp. 268, 274 (E.D.N.Y. 1991) (lawsuit provided "impetus" for FBI to act, "even if simply to negotiate . . . in a more expeditious manner"); Harrison Bros. Meat Packing Co. v. United States Dep't of Agric., 640 F. Supp. 402, 405-06 (M.D. Pa. 1986) (holding it "ludicrous" for government, after "suddenly and inexplicably" releasing records, to assert mootness to avoid paying fees after having denied disclosure at administrative level); Des Moines Register & Tribune Co. v. United States Dep't of Justice, 563 F. Supp. 82, 85 (D.D.C. 1983) (delay of over three years from submission of request to date records were released held not reasonable).

[271] See National Senior Citizens Law Ctr. v. Social Sec. Admin., 849 F.2d
(continued...)

A requester may also be deemed not to have substantially prevailed where the records disclosed were "not significant in terms of the overall FOIA request."[272] Considering a contention that an agency's release of documents was so de minimis as to preclude an award of attorney fees, the D.C. Circuit has stated that the "sheer volume of [a] release is not determinative," and remanded the case for the trial court to "explain why it believes the release of eleven pages [out of the 1,500 pages at issue] is of such substance and quality as to make [plaintiff] eligible for an attorney's fee award."[273]

On the other hand, in some instances, a plaintiff might be deemed to have substantially prevailed even if no records are released. For example, if the lawsuit results in a fee waiver,[274] expedited processing,[275] or a significant change in the agency's FOIA policies,[276] the plaintiff may be eligible for a fee

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[271](...continued)
401, 402-03 (9th Cir. 1988). But see also Fitzgibbon v. Agency for Int'l Dev., No. 87-1548, slip op. at 2-3 (D.D.C. Mar. 26, 1992) (in FOIA context, stipulation in which plaintiff renounces any claim for "costs or fees" precludes claims for court costs only and does not waive plaintiff's right to seek attorney's fees).

[272] Weisberg v. United States Dep't of Justice, 848 F.2d at 1270-71; see Maynard v. CIA, 986 F.2d at 568 (court-ordered "disclosure of a single name was of minimal importance when compared with plaintiff's overall FOIA request"); Wayland v. NLRB, No. 3-85-553, slip op. at 3 (M.D. Tenn. May 19, 1986); Nuclear Control Inst. v. NRC, 595 F. Supp. 923, 926 (D.D.C. 1984); Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287, 291 (D.D.C. 1980). But see also Church of Scientology v. Harris, 653 F.2d at 589 ("no reason in law or logic to discount significance of" 108 envelopes and transmittal slips).

[273] Union of Concerned Scientists v. NRC, 824 F.2d 1219, 1226 (D.C. Cir. 1987); see also McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 5 (D.D.C. Aug. 20, 1987) ("While it is true that a court must assess the quality of information released as well as the volume, the information obtained in this action was scant under either standard.") (citation omitted).

[274] See, e.g., Wilson v. United States Dep't of Justice, No. 87-2415, slip op. at 2 (D.D.C. Sept. 12, 1989), appeal dismissed, No. 89-5206 (D.C. Cir. Mar. 9, 1990); Ettlinger v. FBI, 596 F. Supp. 867, 879-82 (D. Mass. 1984).

[275] See Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (primary basis for awarding fees was plaintiff's success in obtaining court-ordered expedited processing), aff'd, 612 F.2d 1202 (9th Cir. 1980).

[276] See, e.g., Halperin v. Department of State, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977) (suit caused agency to revise its manner of recording "off-the-record" briefings, even though litigation caused no records to be disclosed); Washington Post v. DOD, 789 F. Supp. at 425 (plaintiff "substantially prevailed" where government produced several key documents and "has undertaken to reexamine 2,000 more that had been previously withheld"); Birkland v. Ro-
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award.

Even if a plaintiff satisfies the eligibility test, a court still must exercise its equitable discretion in separately determining whether that plaintiff is entitled to an award.[277] This discretion is guided by four criteria: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law.[278] "Because these factors are intended to foster multiple congressional goals, no single factor is dispositive."[279] It should be noted that these four entitlement factors have nothing to do with determining an appropriate fee amount and, as such, they cannot be considered in that entirely separate analysis.[280]

The "public benefit" factor "'speaks for an award [of attorney fees] where the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices.'"[281] Accordingly, a perti-

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[276](...continued)
tary Plaza, Inc., 643 F. Supp. 223, 225-26 (N.D. Cal. 1986) (suit necessary to force agency to comply with FOIA's subsection (a)(1) requirements); Bollen v. Smith, No. 82-2424, slip op. at 3-4 (W.D. Pa. May 27, 1983) (suit was found necessary to force FBI to admit it had no records; during administrative process it had refused to confirm or deny the existence of the requested records); see also Crooker v. United States Parole Comm'n, 776 F.2d 366, 367 (1st Cir. 1985) (suit ultimately resulted in disclosure of records by causing Solicitor General to abandon prior position that presentence reports were not "agency records" subject to FOIA). But cf. Hendricks v. United States Dep't of Justice, No. 92-5621, slip op. at 2 (E.D. Pa. July 29, 1993) (in absence of agency bad faith, plaintiff did not "substantially prevail" where filing suit clarified that records that agency previously "withheld" did not, in fact, exist).

[277] See Young v. Director, CIA, slip op. at 4 ("Even if a plaintiff substantially prevails, however, a district court may nevertheless, in its discretion, deny the fees."); Texas v. ICC, 935 F.2d at 733 ("The district court did not specify which of the criteria [plaintiff] failed to satisfy. But so long as the record supports the court's exercise of discretion, the decision will stand.").

[278] Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1093; Church of Scientology v. United States Postal Serv., 700 F.2d at 492; Fenster v. Brown, 617 F.2d 740, 742-45 (D.C. Cir. 1979); Cuneo v. Rumsfeld, 553 F.2d at 1364-66.

[279] Republic of New Afrika v. FBI, No. 78-1721, slip op. at 2 (D.D.C. Apr. 29, 1987) (denying plaintiff's motion for reconsideration); see, e.g., Weisker v. United States Dep't of Justice, No. S-89-543, slip op. at 11-17 (E.D. Cal. Mar. 7, 1990) ("balancing" all four factors held to be proper approach).

[280] See Long v. IRS, 932 F.2d 1309, 1315-16 (9th Cir. 1991).

[281] Fenster v. Brown, 617 F.2d at 744 (quoting Blue v. Bureau of Prisons, 570 F.2d 529, 534 (5th Cir. 1978)); see Texas v. ICC, 935 F.2d at 733-34
(continued...)

nent consideration is "the degree of dissemination and likely public impact that might be expected from a particular disclosure."[282] Where the information released is already in the public domain, this factor does not weigh in favor of a fee award.[283]

The second factor requires an examination of whether the plaintiff had an adequate private commercial incentive to litigate its FOIA demand even in the absence of an award of attorney fees.[284] The third factor, often evaluated in

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[281](...continued)
("little public benefit" in disclosure of documents that fail to reflect agency wrongdoing; "Texas went fishing for bass and landed an old shoe. Under the circumstances, we decline to require the federal government to pay the cost of tackle."); Muffoletto v. Sessions, 760 F. Supp. at 277 (public benefit in compelling FBI to act more expeditiously is "remote and of little consequence"); Mendez-Suarez v. Veles, 698 F. Supp. at 908 ("[Though] the treatment of Cubans at the Atlanta penitentiary is a matter of public concern [it] is by no means certain . . . that significant public benefit inures from disclosure of information concerning an incident between inmates at the penitentiary."); Brainerd v. Department of the Navy, No. 87-C-4057, slip op. at 6 (N.D. Ill. Apr. 21, 1988) ("[Though] disclosure of the requested information could conceivably benefit the plaintiff's co-workers . . . , this does not strike the Court as the kind of disclosure which FOIA was intended to facilitate."); Sage v. NLRB, No. 85-943-CV-W-6, slip op. at 6 (W.D. Mo. Nov. 4, 1987) (finding insufficient public benefit where suit "was essentially one to assist a private litigant with discovery problems in a related [unfair labor practices] suit for damages"); Guam Contractors Ass'n v. United States Dep't of Labor, 570 F. Supp. 163, 168 (N.D. Cal. 1983) ("[m]erely incidental or inevitable public benefits of disclosure from a FOIA suit . . . will not automatically satisfy [the requirement of subsection (a)(4)(E)]"). But see Aronson v. HUD, 866 F.2d at 3 (public interest served by disclosure to "private tracer" of information concerning mortgagors who were owed "distributive share" refunds).

[282] Blue v. Bureau of Prisons, 570 F.2d at 533; Church of Scientology v. IRS, 769 F. Supp. at 331 (recognizing public interest in "the apparently improper designation of a religion as a 'tax shelter' project"); see Republic of New Afrika v. FBI, 645 F. Supp. 117, 121 (D.D.C. 1986).

[283] See, e.g., Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1094 (district court did not abuse its discretion in finding that more prompt reporting by Tax Analysts of additional 25% of publicly available district court tax decisions was "less than overwhelming" contribution to public interest).

[284] See, e.g., Fenster v. Brown, 617 F.2d at 742-44 (fees denied to law firm which obtained disclosure of government auditor's manual used in reviewing contracts of the type entered into by firm's clients); Chamberlain v. Kurtz, 589 F.2d 827, 842-43 (5th Cir.) (plaintiff who faced a $1.8 million deficiency claim for back taxes and penalties "needed no additional incentive" to bring FOIA suit against IRS for documents relevant to his defense), cert. denied, 444 U.S. 842 (1979); Frye v. EPA, slip op. at 9 (fees denied where "plaintiff does
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tandem with the second factor, militates against awarding fees in cases where the plaintiff had an adequate personal incentive to seek judicial relief.[285] Indeed, it is "logical" to read the second and third factors together "where a private plaintiff has pursued a private interest."[286] To disqualify a fee applicant under the second and third factors, "a motive need not be strictly commer-

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[284](...continued)
not effectively dispute that the prime beneficiaries of the information requested will be commercial entities with commercial interests that either are, or might become, his clients"); Lyons v. OSHA, No. 88-1562, slip op. at 5 (D. Mass. Dec. 2, 1991) ("As a general rule, courts should not award fees if the requester is a large corporate interest."); Hill Tower, Inc. v. Department of the Navy, 718 F. Supp. 568, 572 (N.D. Tex. 1989) (plaintiff who had filed tort claims against government arising from aircraft crash "had a strong commercial interest in seeking [related] information [as] it was [its] antenna that was damaged by the crash"); Isometrics, Inc. v. Orr, No. 85-3066, slip op. at 9 (D.D.C. Feb. 27, 1987) (bidder's commercial benefit advanced considerably more than public interest when it received competitor's winning bid). But see Aronson v. HUD, 866 F.2d at 3 ("potential for commercial personal gain did not negate the public interest served" by private tracer's lawsuit since "failure of HUD to comply reasonably with its reimbursement duty would probably only be disclosed by someone with a specific interest in ferreting out unpaid recipients").

[285] See, e.g., Frye v. EPA, slip op. at 10 (where plaintiff was partner in environmental law firm, his "proffer that he frequently writes and lectures on environment[al] law without pay is insufficient to overshadow his obvious personal and pecuniary interest in his request"); Muffoletto v. Sessions, 760 F. Supp. at 275 (rejecting plaintiff's entitlement to fees on grounds that "[t]he plaintiff's sole motivation in seeking the requested information was for discovery purposes, namely, to assist him in the defense of a private civil action"); Adams v. United States, 673 F. Supp. 1249, 1259 (S.D.N.Y. 1987) (fees denied where "private self-interest motive" and "[potential] pecuniary benefit" to plaintiff were sufficient inducement to bring suit); Republic of New Afrika v. FBI, 645 F. Supp. at 121 (purely personal motives of plaintiff--to exonerate its members of criminal charges and to circumvent civil discovery--dictated against award of fees); Simon v. United States, 587 F. Supp. 1029, 1033 (D.D.C. 1984) (use of FOIA as substitute for civil discovery "is not proper and this court will not encourage it by awarding fees"); Guam Contractors Ass'n v. United States Dep't of Labor, 570 F. Supp. at 169 (fee award improper where plaintiff "used the FOIA as a 'headstart' for discovery"). But see Crooker v. United States Parole Comm'n, 776 F.2d at 368 (third factor found to favor plaintiff where "interest was neither commercial nor frivolous; instead his interest was to ensure that the Parole Commission relied on accurate information in making decisions affecting his liberty").

[286] Church of Scientology v. United States Postal Serv., 700 F.2d 486, 494 (9th Cir. 1983).

cial; any private interest will do."[287]

The fourth factor counsels against a fee award where the agency "had a reasonable basis in law for concluding that the information in issue was exempt and that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior."[288] In general, an agency's legal basis for withholding is "reasonable" if any pertinent authority exists to support the claimed exemption.[289] Even in the absence of supporting authority, withholding may also be "reasonable" where no precedent directly contradicts the agency's position. In an illustrative example, the D.C. Circuit has upheld a district court's finding of reasonableness when there was "no clear precedent on the issue,"[290] even though the district court's decision in favor of the agency's withholding was reversed unanimously by the court of appeals, which decision, in turn, was affirmed by a near-unanimous decision of the United States Su-

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[287] Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1095 ("'[P]laintiff was not motivated simply by altruistic instincts, but rather by its desire for efficient, easy access to [tax] decisions.'" (quoting Tax Analysts v. United States Dep't of Justice, 759 F. Supp. 28, 31 (D.D.C. 1991))). But see Assembly of Cal. v. United States Dep't of Commerce, slip op. at 12 (where state legislature sought information to challenge federal census count, fees not precluded by fact that benefits may thereby accrue to state in that "plaintiffs did not stand to personally benefit but acted as public servants").

[288] Cuneo v. Rumsfeld, 553 F.2d at 1365-66; see LaSalle Extension Univ. v. FTC, 627 F.2d 481, 484-86 (D.C. Cir. 1980); Fenster v. Brown, 617 F.2d at 744; Frye v. EPA, slip op. at 11 ("[T]he district court may still deny fees and costs upon finding that the government had a colorable legal basis for concluding that the information in issue was exempt and that the government had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior."); Palmer v. Derwinski, No. 91-197, slip op. at 9-10 (E.D. Ky. June 10, 1992) ("[Agency] also exhibited good faith in providing substantially all of the requested documents, and in redacting only limited portions which were arguably subject to specific identifiable exemptions."); see also Blue v. Bureau of Prisons, 570 F.2d at 534 (factor points in favor of fee award "if an agency's nondisclosure was designed to avoid embarrassment or thwart the requester").

[289] See Adams v. United States, 673 F. Supp. at 1259-60; see also American Commercial Barge Lines Co. v. NLRB, 758 F.2d 1109, 1112-14 (6th Cir. 1985); Republic of New Afrika v. FBI, 645 F. Supp. at 122; cf. United Ass'n of Journeymen & Apprentices, Local 598 v. Department of the Army, 841 F.2d 1459, 1462-64 (9th Cir. 1988) (withholding held unreasonable where agency relied on one case that was "clearly distinguishable" and where "strong contrary authority [was] cited by the [plaintiff]"); Core v. United States Postal Serv., No. 82-280-A, slip op. at 7 (E.D. Va. May 2, 1984) (agency's refusal to disclose information, contravening Department of Justice disclosure guidelines published in FOIA Update, held to raise "a question as to the reasonable basis in law" for withholding).

[290] Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1096-97.

preme Court. It should also be noted that where the delay in releasing records, rather than the agency's substantive claim of exemption, is challenged, this factor does not favor a fee award so long as the agency has not engaged in "obdurate behavior or bad faith."[291]

If a court decides to make a fee award, its next task is to determine an appropriate fee amount. The starting point in this endeavor is to multiply the number of hours reasonably expended by a reasonable hourly rate--a calculation which yields what is termed the "lodestar" fee amount.[292] Not all hours expended will be deemed to have been "reasonably" expended. For example, courts have directed attorneys to subtract hours spent litigating claims upon which the party seeking the fee did not ultimately prevail.[293] In such a case, a distinction has been made between a loss on a legal theory where "the issue was all part and parcel of one [ultimately successful] matter,"[294] and a reject-

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[291] Republic of New Afrika v. FBI, 645 F. Supp. at 122; see Frye v. EPA, slip op. at 11-13 (although agency failed to adequately explain plaintiff's more than two-year wait for final response (delay previously found "unreasonable" by court), agency's voluntary disclosure of documents two days before Vaughn Index deadline did not warrant finding of "obdurate" behavior absent affirmative evidence of bad faith); Alliance for Responsible CFC Policy, Inc. v. Costle, 631 F. Supp. at 1471; Simon v. United States, 587 F. Supp. at 1032 ("[W]ithout evidence of bad faith, the court declines to impose a fee award to sanction sluggish agency response."); Guam Contractors Ass'n v. United States Dep't of Labor, 570 F. Supp. at 170; see also Ridley v. Director, Secret Serv., 2 Gov't Disclosure Serv. (P-H) ¶ 82,176, at 82,536 (D.D.C. Feb. 16, 1982) (mere inadvertent withholding of records should not be considered "unreasonable" for purposes of this factor), aff'd, 692 F.2d 150 (D.C. Cir. 1982) (table cite). But see Miller v. United States Dep't of State, 779 F.2d 1378, 1390 (8th Cir. 1985) ("While these reasons [for delay] are plausible, and we do not find them to be evidence of bad faith . . . they are practical explanations, not reasonable legal bases."); United Merchants & Mfrs. v. Meese, No. 87-3367, slip op. at 3 (D.D.C. Aug. 10, 1988) (unnecessary for plaintiff to show "that defendant was obdurate in order to prevail" where there was "no reasonable basis for defendant to have failed to process plaintiff's application for nearly a year").

[292] See Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) (civil rights case); Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (Title VII case).

[293] See Hensley v. Eckerhart, 461 U.S. at 434-40; Copeland v. Marshall, 641 F.2d at 891-92.

[294] Copeland v. Marshall, 641 F.2d at 892 n.18; see National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 n.13 (D.C. Cir. 1982) (as modified); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, No. 81-2662, slip op. at 7 (D.D.C. July 15, 1987) (because plaintiff "clearly prevailed" on its only claim for relief, it is "entitled to recover fees for time expended on the few motions upon which it did not prevail").

ed claim that is "truly fractionable" from the successful claim.[295]

Additionally, prevailing plaintiffs are obligated to exercise sound billing judgment; the Supreme Court has emphasized that "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."[296] It should be remembered, however, that where attorney fees are awarded, the hours expended by the plaintiff pursuing the fee award also are ordinarily compensable.[297]

Courts will accept affidavits from local attorneys to support hourly rates, but they should be couched in terms of specific market rates for particular types of litigation and they must be well documented.[298] The most recent articulation of the proper rate standard, at least within the D.C. Circuit, was set forth in Save our Cumberland Mountains, Inc. v. Hodel,[299] which, in overruling Laffey v. Northwest Airlines, Inc.,[300] held that the "prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-

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[295] See, e.g., Weisberg v. Webster, No. 78-322, slip op. at 3 (D.D.C. June 13, 1985); Newport Aeronautical Sales v. Department of the Navy, slip op. at 10-11; see also Weisberg v. United States Dep't of Justice, 745 F.2d at 1499 (no award for issues in which plaintiff did "not ultimately prevail" and for "non-productive time"); Steenland v. CIA, 555 F. Supp. 907, 911 (W.D.N.Y. 1983) (award for work performed after release of records, where all claims of exemptions subsequently upheld, "would assess a penalty against defendants which is clearly unwarranted"); Agee v. CIA, No. 79-2788, slip op. at 1 (D.D.C. Nov. 3, 1982) ("plaintiff is not entitled to fees covering work where he did not substantially prevail"); Dubin v. Department of the Treasury, 555 F. Supp. 408, 413 (N.D. Ga. 1981) (fees awarded "should not include fees for plaintiffs' counsel for their efforts after the release of documents by the Government . . . since they failed to prevail on their claims at trial"), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite). But see Badhwar v. United States Dep't of the Air Force, No. 84-154, slip op. at 3 (D.D.C. Dec. 11, 1986) ("[D]efendants' attempts to decrease [fees] on the grounds that the plaintiffs did not prevail as to all issues raised . . . are not persuasive. [The FOIA] requires only that the plaintiff should have 'substantially prevailed.'").

[296] Hensley v. Eckerhart, 461 U.S. at 434, quoted in Assembly of Cal. v. United States Dep't of Commerce, slip op. at 26.

[297] See Copeland v. Marshall, 641 F.2d at 896; see, e.g., Assembly of Cal. v. United States Dep't of Commerce, slip op. at 37-39; Katz v. Webster, No. 82-1092, slip op. at 4-5 (S.D.N.Y. Feb. 1, 1990).

[298] See National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1325.

[299] 857 F.2d 1516 (D.C. Cir. 1988) (en banc) (Surface Mining Control and Reclamation Act case).

[300] 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985).

economic goals."[301]

The lodestar calculation is strongly presumed to yield the reasonable fee.[302] Indeed, the Supreme Court has placed stringent limitations on the availability of any fee "enhancement" (sometimes termed a "multiplier") above the lodestar figure, based upon the quality of representation and the results obtained.[303] Except in Powell v. Department of Justice,[304] a quality enhancement has never been awarded in a FOIA case.[305]

Although it previously has been held that a fee enhancement as compensation for the risk in a contingency fee arrangement might be available in FOIA cases,[306] the Supreme Court has now clarified that such enhancements are not available under statutes authorizing an award of attorney fees to a "prevailing or substantially prevailing party," such as the FOIA.[307]

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[301] 857 F.2d at 1524.

[302] See Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 564-65 (1985) [hereinafter Delaware Valley II] (Clean Air Act case); Blum v. Stenson, 465 U.S. 886, 897 (1984) (civil rights case).

[303] See Delaware Valley I, 478 U.S. at 565 (quality enhancements appropriate "only in certain 'rare' and 'exceptional' cases, where supported by 'specific evidence' on the record and detailed findings by the lower courts" (quoting Blum v. Stenson, 465 U.S. at 898-901)).

[304] No. C-82-326, slip op. at 22-23 (N.D. Cal. Sept. 19, 1985) (pre-Delaware Valley I decision awarding fee enhancement based upon "superior representation").

[305] See, e.g., National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, slip op. at 12-13 (fee applicant bears "heavy burden of proof" to justify quality enhancement; court "not convinced that this is the 'rare or exceptional' case where an upward adjustment is appropriate" (quoting Murray v. Weinberger, 741 F.2d 1423, 1428 (D.C. Cir. 1984))); Newport Aeronautical Sales v. Department of the Navy, slip op. at 17 ("Blum v. Stenson makes clear that only the most exceptional cases will warrant an increase to the lodestar.").

[306] See, e.g., Weisberg v. United States Dep't of Justice, 848 F.2d at 1272 (ruling that two-part test fashioned in Justice O'Connor's concurring opinion in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 731-34 (1987), is applicable to FOIA cases); Allen v. FBI, 751 F. Supp. 255, 256 (D.D.C. 1990) (100% fee enhancement awarded in FOIA case); see also McKenzie v. Kennickell, 875 F.2d 330, 334 (D.C. Cir. 1989) (Title VII case).

[307] City of Burlington v. Dague, 112 S. Ct. at 2641 (prohibiting contingency enhancement in environmental fee-shifting statutes and noting that case law "construing what is a 'reasonable' fee applies uniformly to all [federal fee-shifting statutes]"); see also King v. Palmer, 950 F.2d 771, 775 (D.C. Cir. 1991) (en banc) (pre-City of Burlington Title VII contingency enhancement case

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LITIGATION CONSIDERATIONS

While "interim" attorney fees may be sought before the conclusion of a suit,[308] a majority of courts have declined to award them, absent extenuating circumstances, due to the inefficient and "piecemeal" nature of such relief.[309] Where interim fees are approved, however, payment of the fees need not await the final judgment in the action.[310] It should also be noted that where all substantive legal issues have been resolved by the district court, the mere pendency of an application for fees does not preclude appellate review of the district court's decision on the merits.[311]

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[307](...continued)
which anticipated result later reached by Supreme Court), cert. denied, 112 S. Ct. 3054 (1992).

[308] See Rosenfeld v. United States, 859 F.2d 717, 723-27 (9th Cir. 1988); Washington Post v. DOD, 789 F. Supp. at 424-25; Allen v. DOD, 713 F. Supp. 7, 11-12 (D.D.C. 1989).

[309] See, e.g., Irons v. FBI, No. 82-1143-G, slip op. at 9-10 (D. Mass. June 26, 1987) (no interim fees where government has not "resisted actively, or through egregious delay, compliance with a proper document request"); Shanmugadhasan v. Arms Control & Disarmament Agency, No. 84-3033, slip op. at 2 (D.D.C. Aug. 9, 1985) (interim fees denied as "premature"); Hydron Lab., Inc. v. EPA, 560 F. Supp. 718, 722 (D.R.I. 1983) (refusing to deal "piecemeal" with questions concerning entitlement to attorney fees); Letelier v. United States Dep't of Justice, 1 Gov't Disclosure Serv. (P-H) ¶ 80,252, at 80,631 (D.D.C. Oct. 2, 1980) (interim award "would likely result in duplication of effort, as fees might be requested at successive stages"); Biberman v. FBI, 496 F. Supp. 263, 265 (S.D.N.Y. 1980) (interim fees are exceptional and "because of the inefficiency of such a procedure, such an award ought to be made only in those cases in which it is necessary to the continuance of the litigation which has proven to be meritorious at the time of the application"). But see Wilson v. United States Dep't of Justice, slip op. at 3 (interim fees awarded "for time spent addressing the fee waiver question" on which plaintiff prevailed); Allen v. FBI, 716 F. Supp. 667, 669-72 (D.D.C. 1989) (awarding interim fees for work leading toward "first phase" release of nonexempt documents, but declining to award them as to all such documents not yet released); Allen v. DOD, 713 F.2d at 12-13 (awarding interim fees, but only "for work leading toward the threshold release of non-exempt documents" and holding that "[a]ny claims for fees resulting from a dispute over the applicability of a particular exemption to specific documents (a phase two dispute) would only be cognizable at the end of the litigation"); Powell v. United States Dep't of Justice, 569 F. Supp. 1192, 1200 (N.D. Cal. 1983) (four factors to be considered, in court's discretion, for award of interim fees: degree of hardship on plaintiff and counsel; existence of unreasonable delay by government; length of time case already pending; and length of time required before litigation is concluded).

[310] Rosenfeld v. United States, 859 F.2d at 727; Washington Post v. DOD, 789 F. Supp. at 425.

[311] See McDonnell v. United States, No. 91-5916, slip op. at 9 (3d Cir. Sept. 21, 1993) ("Even if a motion for attorney's fees is still pending in the
(continued...)

Finally, it should be noted that in a case decided under Title VII, but logically applicable to the FOIA as well, the Supreme Court has held that, absent an express waiver, a private party cannot recover interest against the federal government.[312] Indeed, a fee enhancement to compensate counsel for delay in receiving fees was deemed "interest" and, accordingly, was denied in Weisberg v. Department of Justice.[313]

Sanctions

Although the FOIA does not authorize any award of monetary damages to a requester, either for an agency's unjustified refusal to release records,[314] or for allegedly improper disclosure of information,[315] the Act does provide that, in certain narrowly prescribed circumstances, agency employees who act arbitrarily or capriciously in withholding information may be subject to disciplinary action. Subsection (a)(4)(F) of the FOIA, as amended, provides:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel [of the Merit Systems Protection Board] shall promptly initiate a proceeding to determine whether

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[311](...continued)
district court, that motion does not constitute a bar to our exercise of jurisdiction under § 1291." (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-202 (1988))) (to be published); see also Anderson v. HHS, No. 92-4125, slip op. at 4 (10th Cir. Aug. 27, 1993) ("'We think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.'" (citing Budinich, 486 U.S. at 200)) (to be published).

[312] Library of Congress v. Shaw, 478 U.S. 310, 314 (1986).

[313] 848 F.2d at 1272.

[314] Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993); Papich v. United States Parole Comm'n, No. 92-790, slip op. at 1 (D.D.C. June 23, 1993); Duffy v. United States, No. 87-C-10826, slip op. at 31-32 (N.D. Ill. May 29, 1991) ("money damages is not a remedy authorized in the FOIA"); Daniels v. St. Louis Veterans Admin. Regional Office, 561 F. Supp. 250, 251 (E.D. Mo. 1983); Diamond v. FBI, 532 F. Supp. 216, 233 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984).

[315] Sterling v. United States, 798 F. Supp. 47, 48 & n.2 (D.D.C. 1992) (neither FOIA nor Administrative Procedure Act authorize award of monetary damages for alleged improper disclosure) (appeal pending).

disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.[316]

Thus, there are three distinct jurisdictional prerequisites to the commencement of a Special Counsel investigation under the FOIA: (1) the court must order the production of agency records found to be improperly withheld; (2) it must award attorney fees and litigation costs; and (3) it must issue a specific "written finding" of suspected arbitrary or capricious conduct.[317] In one case, Miller v. Webster, it was found that the circumstances surrounding the withholding of small portions of three documents did "suggest that the agency decision was arbitrary and capricious."[318] Despite having ordered disclosure of this information and awarding attorney fees, the court refused to refer the "alleged violation" to the Merit Systems Protection Board, citing the common law maxim of "de minimis non curat lex" (the law takes no notice of trifling matters).[319] Nevertheless, the viability and importance of this sanction provision should not be overlooked by agency FOIA personnel.[320]

Additionally, the Special Counsel of the Merit Systems Protection Board is authorized by a provision of the Whistleblower Protection Act of 1989 to investigate certain allegations concerning arbitrary or capricious withholding of information requested under the FOIA.[321] A significant distinction between this provision and subsection (a)(4)(F) of the FOIA is that the former does not require a judicial finding--indeed, no lawsuit need even be filed to invoke this

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[316] 5 U.S.C. § 552(a)(4)(F) (1988).

[317] See, e.g., Simon v. United States Dep't of Labor, No. 83-3780, slip op. at 2-3 (D.D.C. Mar. 21, 1984) (court refused to issue "sanctions" finding where all requested records had been produced in their entireties, because it could not order production of any records); Emery v. Laise, 421 F. Supp. 91, 93 (D.D.C. 1976) (same), aff'd sub nom. Emery v. Reinhardt, No. 76-1973 (D.C. Cir. Oct. 26, 1977); see also Wilder v. IRS, 601 F. Supp. 241, 243 (M.D. Ala. 1984) (although disclosure delayed, no sanctions imposed because all material released); Idaho Wildlife Fed'n v. Forest Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,271, at 84,058 (D.D.C. July 21, 1983) (no sanctions where agency records not improperly withheld); Norwood v. FAA, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (where court denies fees on ground that plaintiff is pro se, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since both prerequisites have not been met"), aff'd in part, rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993). Contra Ray v. United States Dep't of Justice, 716 F. Supp. 1449, 1451-52 (S.D. Fla. 1989) ("court order" requirement satisfied even though no record found to be improperly withheld).

[318] No. 77-C-3331, slip op. at 4 (N.D. Ill. Oct. 27, 1983).

[319] Id.

[320] See FOIA Update, Summer 1983, at 5.

[321] 5 U.S.C. § 1216(a)(3) (Supp. IV 1992).

other sanction procedure.[322]

Finally, as in all civil cases, courts may exercise their discretion to impose sanctions on FOIA litigants and government counsel who have violated court rules or shown disrespect for the judicial process.[323] In determining whether to impose sanctions on plaintiffs, district courts review the number and content of court filings and their effect on the courts as indicia of frivolousness or harassment.[324] "[M]ere litigiousness alone does not support the issuance of an injunction" against filing further lawsuits.[325] For example, as a sanction under Rule 11 of the Federal Rules of Civil Procedure, a frequent FOIA requester who filed more than forty-nine FOIA lawsuits over eight years and who routinely failed to oppose motions to dismiss, was ordered to justify in any subsequent lawsuits why the principle of res judicata did not bar the intended suit.[326]

Considerations on Appeal

As a threshold matter, particularly in view of the exceptionally high percentage of FOIA cases decided by means of summary judgment, it should always be remembered that not all orders granting judgment to a party on a

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[322] See H.R. Rep. No. 1717, 95th Cong., 2d Sess. 137 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2870 ("[T]his provision is not intended to require that an administrative or court decision be rendered concerning withholding of information before the Special Counsel may investigate allegations of such a prohibited practice.").

[323] See, e.g., Schanen v. United States Dep't of Justice, 798 F.2d 348, 350 (9th Cir. 1986) (although exemption claims ultimately upheld, government ordered to pay plaintiff's attorney fees and costs due to government counsel's failure to competently defend claims); Oklahoma Publishing Co. v. HUD, No. 87-1935-P, slip op. at 7 (W.D. Okla. June 17, 1988) (attorney fees assessed against government when counsel failed to comply with scheduling and disclosure orders); Hill v. Department of the Air Force, No. 85-1485, slip op. at 7 (D.N.M. Sept. 4, 1987) (because of unreasonable delay in processing FOIA request, documents ordered processed at no further cost to plaintiff), aff'd on other grounds, No. 86-2418 (10th Cir. Mar. 30, 1988); see also Van Bourg, Allen, Weinberg & Roger v. NLRB, 762 F.2d 831, 833 (9th Cir. 1985) (warning that sanctions will be imposed if plaintiff's counsel again "fails to inform us about material facts or procrastinates in obeying our orders"); cf. Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 2 (D.D.C. July 27, 1988) (discovery ordered against government for failure to comply with previous estimates of processing time and to explain discrepancies in time estimates).

[324] See, e.g., In re Powell, 851 F.2d 427, 431-34 (D.C. Cir. 1988) (per curiam).

[325] Id. at 434.

[326] Crooker v. United States Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C. 1986).

FOIA issue are immediately appealable.[327]

Once a case is on appeal, it is necessary for the government to obtain a stay of any trial court disclosure order. The government's motion for such a stay should be granted as a matter of course in FOIA cases, as denial would destroy the status quo and would cause irreparable harm to the government appellant by mooting the issue on appeal, whereas granting such a stay causes relatively minimal harm to the appellee.[328]

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[327] See, e.g., Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (court ruling that document is nonexempt, without accompanying disclosure order, held nonappealable); Ferguson v. FBI, 957 F.2d 1059, 1063-64 (2d Cir. 1992) (while "partial disclosure orders in FOIA cases are appealable," fact that district court may have erred in deciding question of law does not vest jurisdiction in appellate court where no disclosure order has yet been entered and, consequently, no irreparable harm would result); Center for Nat'l Sec. Studies v. CIA, 711 F.2d 409, 413-14 (D.C. Cir. 1983) (no appellate jurisdiction to review district court order granting summary judgment to defendant on only one of twelve counts in complaint because district court order did not affect "predominantly all" merits of case and plaintiffs did not establish that denial of relief under 28 U.S.C. § 1292(a)(1) (1988) would cause them irreparable injury); see also Summers v. United States Dep't of Justice, 925 F.2d 450, 453 (D.C. Cir. 1991) (grant of stay of proceedings under Open America not appealable "final decision"); Rosenfeld v. United States, 859 F.2d 717, 727 (9th Cir. 1988) (award of interim attorney fees not appealable); Hinton v. FBI, 844 F.2d 126, 129-33 (3d Cir. 1988) (form of Vaughn order not appealable); In re Motion to Compel filed by Steele, 799 F.2d 461, 464-65 (9th Cir. 1986); Metex Corp. v. ACS Indus., 748 F.2d 150, 153 (3d Cir. 1984); Green v. Department of Commerce, 618 F.2d 836, 839-41 (D.C. Cir. 1980). But see also John Doe Corp. v. John Doe Agency, 850 F.2d 105, 107-08 (2d Cir. 1988) (finding district court order denying motion for disclosure of documents, preparation of Vaughn Index and answers to interrogatories appealable, and reversing on merits), rev'd, 493 U.S. 146 (1989); Irons v. FBI, 811 F.2d 681, 683 (1st Cir. 1987) (allowing government to appeal motion for partial summary judgment for plaintiff, stating that appellate jurisdiction vests at time order is made for government to turn over records).

[328] See, e.g., Assembly of Cal. v. United States Dep't of Commerce, No. S91-990, slip op. at 3 (E.D. Cal. Aug. 20, 1991) (order granting preliminary injunction and refusing to stay disclosure), stay denied, No. 91-16266 (9th Cir. Aug. 30, 1991), stay granted, 112 S. Ct. 19 (1991); Rosenfeld v. United States Dep't of Justice, 111 S. Ct. 2864 (1991) (full stay pending appeal granted); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1307 (Marshall, Circuit Justice 1989) (granting stay based upon "balance of the equities"); see also Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); Antonelli v. FBI, 553 F. Supp. 19, 25 (N.D. Ill. 1982); see generally FOIA Update, Summer 1991, at 1-2. But see Manos v. United States Dep't of the Air Force, No. 93-15672, slip op. at 2 (9th Cir. Apr. 28, 1993) (stay of district court disclosure order denied where government "failed to demonstrate . . . any possibility of success on the merits of its appeal," despite appellate court's recognition that

(continued...)

In reviewing FOIA decisions, appellate courts most commonly determine (1) whether the district court had an adequate factual basis for its determination, and (2) assuming the existence of an adequate factual basis, whether the court's determination was clearly erroneous.[329] Arguably, however, the legal standard of review for cases in which the district court awarded summary judgment should be more akin to de novo review.[330] Nevertheless, a trial court decision refusing to allow discovery will be reversed only if the court abused its discretion.[331] Similarly, a "reverse" FOIA case--which is brought under the Administrative Procedure Act--is reviewed only with reference to whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," based upon the "whole [ad-

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[328](...continued)
such denial would render appeal moot); Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 5 (N.D. Cal. June 14, 1985) (denying stay of decision ordering release of, inter alia, classified information, because of governmental delay and "obfuscation"), stay denied, No. 85-1918 (9th Cir. July 18, 1985), stay denied, No. A-84 (Rehnquist, Circuit Justice July 31, 1985) (undocketed order).

[329] See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 2 (3d Cir. Sept. 21, 1993) (to be published); Miscavige v. IRS, No. 92-8659, slip op. 3284, 3285 (11th Cir. Sept. 17, 1993) (to be published); Van Strum v. EPA, No. 91-35404, slip op. at 2 (9th Cir. Aug. 17, 1992); Silets v. United States Dep't of Justice, 945 F.2d 227, 232 n.2 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 2991 (1992); National Wildlife Fed'n v. Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987); Villanueva v. United States Dep't of Justice, 782 F.2d 528, 530 (5th Cir. 1986); International Bhd. of Elec. Workers v. HUD, 763 F.2d 435, 435-36 (D.C. Cir. 1985); see also Payne Enters. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988) (abuse of discretion standard); DeBold v. Stimson, 735 F.2d 1037, 1040 (7th Cir. 1984) (trial court's factual finding that all requested records had been produced was not clearly erroneous and would therefore not be reversed on appeal).

[330] See Anderson v. HHS, 907 F.2d 936, 942 (10th Cir. 1990) ("[W]e must review de novo the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions."); Aronson v. HUD, 822 F.2d 182, 188 (1st Cir. 1987); 10 Charles A. Wright et al., Federal Practice and Procedure § 2716 (1983); see also Bowers v. United States Dep't of Justice, 930 F.2d 350, 353 (4th Cir.) (appellate review de novo on question of law), cert. denied, 112 S. Ct. 308 (1991); Kaganove v. EPA, 856 F.2d 884, 886 (7th Cir. 1988) (same), cert. denied, 488 U.S. 1011 (1989).

[331] See Church of Scientology v. IRS, 991 F.2d 560, 562 (9th Cir. 1993); Meeropol v. Meese, 790 F.2d 942, 960 (D.C. Cir. 1986); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1988).

ministrative] record."[332]

It is noteworthy that in routine FOIA cases where the merits and law of a case are so clear as to justify summary disposition, summary affirmance or reversal may be appropriate.[333] Other procedures are available for discharging the appellate court's functions in unusual procedural circumstances.[334]

Lastly, Rule 39(a) of the Federal Rules of Appellate Procedure is applied to award costs to the government when it is successful in the FOIA appeal; the Court of Appeals for the District of Columbia Circuit has held that the presumption in Rule 39(a) favoring such awards of costs is fully applicable in FOIA cases.[335]

"REVERSE" FOIA

A "reverse" FOIA action is one in which the submitter of information--usually a corporation or other business entity that has supplied an agency with data on its policies, operations or products--seeks to prevent the agency from releasing the information to a third party in response to a FOIA request.[1] The agency's decision to release the information will ordinarily "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the information falls within one or more of the statutory

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[332] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987); see Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991).

[333] See, e.g., Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

[334] See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 842 (6th Cir. 1988) (inappropriate to vacate district court order, after fully complied with, when attorney fees issue pending; proper procedure is to dismiss appeal); Larson v. Executive Office for United States Attorneys, No. 85-6226, slip op. at 4 (D.C. Cir. Apr. 6, 1988) (when only issue on appeal is mooted, initial lower court order should be vacated without prejudice and case remanded).

[335] See Baez v. United States Dep't of Justice, 684 F.2d 999, 1005-07 (D.C. Cir. 1982) (en banc).

[1] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); cf. Gulf Oil Corp. v. Brock, 778 F.2d 834, 838 (D.C. Cir. 1985) (when FOIA request withdrawn while case on appeal, dispute that was once before court became moot); Sterling v. United States, 798 F. Supp. 47, 48 (D.D.C. 1992) (once record has been released, "there are no plausible factual grounds for a 'reverse FOIA' claim") (appeal pending).

exemptions."[2]

The landmark case in the reverse FOIA area is Chrysler Corp. v. Brown,[3] in which the Supreme Court held that jurisdiction for a reverse FOIA action cannot be based on the FOIA or the Trade Secrets Act[4] (a broadly worded criminal statute prohibiting disclosure of "practically any commercial or financial data collected by any federal employee from any source"[5]), but that such actions can be brought under the Administrative Procedure Act (APA).[6] Accordingly, reverse FOIA plaintiffs ordinarily argue that an agency's contemplated release would violate the Trade Secrets Act and thus would "not be in accordance with law" or would be "arbitrary and capricious" within the meaning of the APA.[7]

In Chrysler, the Supreme Court specifically did not address the "relative ambits" of Exemption 4 and the Trade Secrets Act, nor did it determine whether the Trade Secrets Act qualified as an Exemption 3 statute.[8] Almost a decade later, the Court of Appeals for the District of Columbia Circuit, after repeatedly skirting these difficult issues, "definitively" resolved them.[9] With re-

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[2] CNA, 830 F.2d at 1134 n.1.

[3] 441 U.S. 281, 292-317 (1979).

[4] 18 U.S.C. § 1905 (1988).

[5] CNA, 830 F.2d at 1140.

[6] 5 U.S.C. §§ 701-706 (1988); see, e.g., Kansas Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 3 (D.D.C. July 2, 1993) ("party seeking to prevent disclosure . . . must rely on other sources of law, independent of FOIA, to justify enjoining disclosure"); Environmental Technology, Inc. v. EPA, 822 F. Supp. 1226, 1228 (E.D. Va. 1993); see also McDonnell Douglas Corp. v. Rice, No. 92-2211, transcript at 32 (D.D.C. Sept. 30, 1992) (bench order) (submitter sought injunction under APA to prevent agency from making public announcement of exercised option price in government contract awarded to submitter) (motion for reconsideration pending).

[7] See, e.g., Acumenics Research & Technology v. Department of Justice, 843 F.2d 800, 804 (4th Cir. 1988); General Elec. Co. v. NRC, 750 F.2d 1394, 1398 (7th Cir. 1984); Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 5 (D.D.C. Sept. 2, 1993); General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 806 (D.D.C. 1992) (appeal pending); McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 6 (D.D.C. Jan. 24, 1992) (bench order) (appeal pending); Raytheon Co. v. Department of the Navy, No. 89-2481, slip op. at 4 (D.D.C. Dec. 22, 1989); cf. Kansas Gas & Elec. Co. v. NRC, slip op. at 4 (holding that submitter's "unsuccessful earlier attempt" to suppress disclosure in state court "effectively restrains it" from raising same arguments again in reverse FOIA action).

[8] 441 U.S. at 319 n.49.

[9] See CNA, 830 F.2d at 1134.

gard to the Trade Secrets Act and Exemption 3, the D.C. Circuit held that the Trade Secrets Act does not qualify as an Exemption 3 statute under either of that exemption's subparts, particularly as it acts only as a prohibition against "unauthorized" disclosures.[10] Indeed, because "agencies conceivably could control the frequency and scope of its application through regulations adopted on the strength of statutory withholding authorizations which do not themselves survive the rigors of Exemption 3," the D.C. Circuit found it inappropriate to classify the Trade Secrets Act as an Exemption 3 statute.[11] (For a further discussion of this point, see Exemption 3, above.)

In addition, the D.C. Circuit ruled that the scope of the Trade Secrets Act is not narrowly limited to that of its three predecessor statutes, and that instead, its scope is "at least co-extensive with that of Exemption 4."[12] Thus, information falling within the ambit of Exemption 4 would also fall within the scope of the Trade Secrets Act.[13] Accordingly, in the absence of a regulation authorizing disclosure--which would remove the Trade Secrets Act's disclosure prohibition[14]--a determination that requested material falls within Exemption 4 is tantamount to a determination that the material cannot be released, because to do so would violate the Trade Secrets Act.[15] To the extent information falls outside the scope of Exemption 4, the D.C. Circuit found that there was no need to determine whether it nonetheless still fits within the outer boundaries of the Trade Secrets Act.[16] Such a ruling was unnecessary because the FOIA itself would provide the necessary authorization to release any information not

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[10] Id. at 1141.

[11] Id. at 1139-40.

[12] Id. at 1151; accord McDonnell Douglas Corp. v. Rice, transcript at 35; General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806.

[13] See, e.g., Raytheon Co. v. Department of the Navy, slip op. at 4.

[14] See, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979); Jackson v. First Fed. Sav., 709 F. Supp. 887, 890-94 (E.D. Ark. 1989); cf. South Hills Health Sys. v. Bowen, 864 F.2d 1084, 1093 (3d Cir. 1988) (rejecting challenge to validity of Trade Secrets Act disclosure regulation as unripe).

[15] CNA, 830 F.2d at 1151-52; accord Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (where release of requested information is barred by the Trade Secrets Act, agency "does not have discretion to release it"); Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1228 (Trade Secrets Act "bars disclosure of information that falls within Exemption 4"); General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806 (finding that Trade Secrets Act "is an independent prohibition on the disclosure of information within its scope"); see also FOIA Update, Summer 1985, at 3 (discussing Trade Secrets Act bar to discretionary disclosure under Exemption 4).

[16] CNA, 830 F.2d at 1152 n.139.

falling within one of its exemptions.[17]

In Chrysler, the Supreme Court held that the APA's predominant scope and standard of judicial review--review on the administrative record according to an arbitrary and capricious standard--should "ordinarily" apply to reverse FOIA actions.[18] Indeed, the D.C. Circuit has strongly emphasized that judicial review in reverse FOIA cases should be based on the administrative record, with de novo review reserved for only those cases where an agency's administrative procedures were "severely defective."[19]

More recently, the D.C. Circuit reaffirmed its position on the appropriate scope of judicial review in reverse FOIA cases, holding that the district court "behaved entirely correctly" when it rejected the argument advanced by the submitter--that it was entitled to de novo review because the agency's factfinding procedures were inadequate--and instead confined its review to an examination of the administrative record.[20] The Court of Appeals for the Ninth Circuit, likewise rejecting a submitter's challenge to an agency's factfinding procedures, recently held that judicial review based on the administrative record was appropriate in a reverse FOIA suit.[21]

Because judicial review in reverse FOIA cases is ordinarily based on a review of an agency's administrative record, it is vitally important that agencies

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[17] Id.

[18] 441 U.S. at 318; accord Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991).

[19] National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 745 (D.C. Cir. 1984) (per curiam) (McGowan & Mikva, JJ., concurring in result); accord Acumenics Research & Technology v. United States Dep't of Justice, 843 F.2d at 804-05; Burnside-Ott Aviation Training Ctr., Inc. v. United States, 617 F. Supp. 279, 282-84 (S.D. Fla. 1985); cf. Alcolac, Inc. v. Wagoner, 610 F. Supp. 745, 749 (W.D. Mo. 1985) (agency confidentiality determination upheld as "rational"). But see Carolina Biological Supply Co. v. United States Dep't of Agric., No. 93CV00113, slip op. at 4 & n.2 (M.D.N.C. Aug. 2, 1993) (applying de novo review after observing that standard of review issue presented close "judgment call"); Artesian Indus. v. HHS, 646 F. Supp. 1004, 1005-06 (D.D.C. 1986) (court flatly rejected position advanced by both parties that it base its decision on agency record according to arbitrary and capricious standard).

[20] CNA, 830 F.2d at 1162; see, e.g., General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806-07; McDonnell Douglas Corp. v. NASA, transcript at 6 (recognizing that court has "very limited scope of review"); International Computaprint Corp. v. United States Dep't of Commerce, No. 87-1848, slip op. at 12-13 (D.D.C. Aug. 16, 1988); Davis Corp. v. United States, No. 87-3365, slip op. at 5 (D.D.C. Jan. 19, 1988).

[21] Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d at 1348.

take care to develop a comprehensive one.[22] Indeed, the Court of Appeals for the Seventh Circuit once chastised an agency for failing to develop an adequate record in a reverse FOIA action. Although recognizing that procedures designed to determine the confidentiality of requested records need not be "as elaborate as a licensing," it found that the agency's one-line decision rejecting the submitter's position "validates congressional criticisms of the excessive casualness displayed by some agencies in resolving disputes over the application of exemption 4."[23]

Likewise, two other reverse FOIA cases had to be remanded back to the agency for development of a more complete administrative record before the court could conduct its review. In one, the D.C. Circuit reversed the decision of the district court, which had permitted an inadequate record to be supplemented in court by an agency affidavit, holding that because the agency had failed at the administrative level to give a reason for its refusal to withhold certain price information, it was precluded from offering a "post-hoc rationalization" for the first time in court.[24] The D.C. Circuit emphasized that judicial review in reverse FOIA cases must be conducted on the basis of the "administrative record compiled by the agency in advance of litigation."[25] Of course, agency affidavits that do "no more than summarize the administrative record" are permissible.[26]

In another case, the D.C. Circuit affirmed the decision of the district court to remand the case back to the SEC for further proceedings because the court was unable to perform its "reviewing function" in the absence of a com-

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[22] See Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d at 277 (court "cannot properly perform" its reviewing function "unless the agency has explained the reasons for its decision"). Compare McDonnell Douglas Corp. v. NASA, transcript at 6 (agency's action found arbitrary and capricious based on insufficient agency record) with General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806 (agency's action found not to be arbitrary and capricious based upon "lengthy and thorough" administrative record).

[23] General Elec. Co. v. NRC, 750 F.2d at 1403 (case remanded for elaboration of basis for agency's decision).

[24] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987).

[25] Id.; see also General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 805 n.1 (refusing to allow submitter to supplement record).

[26] Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988); accord Lykes Bros. S.S. Co. v. Pena, slip op. at 16 (agency affidavit that "merely elaborates" on basis for agency decision and "provides a background for understanding the redactions" proposed, found permissible); see also, e.g., International Computaprint Corp. v. United States Dep't of Commerce, slip op. at 12 n.36.

plete administrative record.[27] In that decision, the D.C. Circuit also rejected the SEC's argument that a reverse-FOIA plaintiff bears the burden of proving the nonpublic availability of information, finding that it is "far more efficient, and obviously fairer" for the burden to be placed on the party who claims that the information is public.[28] It also upheld the district court's requirement that the SEC prepare a document-by-document explanation for its denial of confidential treatment.[29] Specifically, the D.C. Circuit found that the agency's burden of justifying its decision "cannot be shirked or shifted to others simply because the decision was taken in a reverse-FOIA rather than a direct FOIA context."[30] Moreover, it observed, in cases where the public availability of information is the basis for an agency's decision to disclose, the justification of that position is "inevitably document-specific."[31]

Rather than order a remand, the District Court for the District of Columbia has recently ruled against an agency--even going so far as to permanently enjoin it from releasing the requested information--on the basis of a record that it found insufficient under the standards of the APA.[32] Specifically, the court noted that the agency "did not rebut any of the evidence produced" by the submitter, "did not seek or place in the record any contrary evidence, and simply ha[d] determined" that the evidence offered by the submitter was "insufficient or not credible."[33] This, the court found, "is classic arbitrary and capricious action by a government agency."[34]

Conversely, this same court upheld an agency's disclosure determination on the basis of an administrative record that demonstrated that the agency "specifically considered" and "understood" the arguments of the submitter and "provided reasons for rejecting them."[35] In so ruling, the court took note of the "lengthy and thorough" administrative process, during which the agency

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[27] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 346 (D.C. Cir. 1989); see also Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d at 278-81 (remanding case due to inadequacy of agency's administrative record).

[28] Occidental Petroleum Corp. v. SEC, 873 F.2d at 342.

[29] Id. at 343-44.

[30] Id. at 344.

[31] Id.

[32] McDonnell Douglas Corp. v. NASA, transcript at 5-6, 10; see also Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1230 (without even addressing adequacy of agency record, court perfunctorily granted submitter's motion for permanent injunction).

[33] McDonnell Douglas Corp. v. NASA, transcript at 6.

[34] Id.

[35] General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 807.

"repeatedly solicited and welcomed" the submitter's views on the applicability of a FOIA exemption.[36] This record demonstrated that the agency's action was not arbitrary or capricious.[37]

Administrative practice in potential reverse FOIA situations is generally governed by an executive order issued six years ago. Executive Order No. 12,600 requires federal agencies to establish certain predisclosure notification procedures which will assist agencies in developing adequate administrative records.[38] The executive order recognizes that submitters of proprietary information have certain procedural rights and it therefore mandates that notice be given to submitters of confidential commercial information whenever the agency "determines that it may be required to disclose" the requested data.[39]

Once submitters are notified under this procedure, they must be given a reasonable period of time within which to object to disclosure of any of the requested material.[40] If that objection is not sustained by the agency, the submitter must be notified in writing and given a brief explanation of the agency's decision.[41] Such a notification must be provided a reasonable number of days prior to a specified disclosure date, which gives the submitter an opportunity to seek judicial relief.[42] This executive order mirrors in many ways the policy guidance issued by the Department of Justice in June 1982,[43] and for most federal agencies it reflects what already was existing practice.[44]

This executive order predates the decision of the D.C. Circuit in Critical Mass Energy Project v. NRC,[45] and thus does not contain any procedures for notifying submitters of voluntarily provided information in order to determine if

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[36] Id. at 806.

[37] Id. at 807; accord Lykes Bros. S.S. Co. v. Pena, slip op. at 15 (agency "provided considerable opportunity" for submitters to "contest the proposed disclosures, and provided sufficient reasons on the record for rejecting" submitters' arguments).

[38] 3 C.F.R. 235 (1988) (applicable to all executive branch departments and agencies), reprinted in 5 U.S.C. § 552 note (1988) and in FOIA Update, Summer 1987, at 2-3.

[39] Exec. Order No. 12,600, § 1.

[40] Id. § 4.

[41] Id. § 5.

[42] Id.

[43] See FOIA Update, June 1982, at 3.

[44] See FOIA Update, Fall 1983, at 1; see also FOIA Update, Summer 1987, at 1.

[45] 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

that information is "of a kind that would customarily not be released to the public by the person from whom it was obtained."[46] (For a further discussion of this new "customary treatment" standard, see the Applying Critical Mass subsection of Exemption 4, above.) As a matter of sound administrative practice, however, agencies should employ procedures analogous to those set forth in Executive Order No. 12,600 when making determinations under this "customary treatment" standard.[47] Accordingly, if an agency is uncertain of the submitter's customary treatment of information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment--including any disclosures that are customarily made and the conditions under which such disclosures occur.[48] The agency should then make an objective determination as to whether or not the "customary treatment" standard is satisfied.[49]

The procedures set forth in Executive Order No. 12,600 do not provide a submitter with a formal evidentiary hearing. This is entirely consistent with what has now become well-established law, i.e., that an agency's procedures for resolving a submitter's claim of confidentiality are not inadequate simply because they do not afford the submitter a right to an evidentiary hearing.[50] Agencies should be aware, though, that confusion and litigation can result from using telephone conversations as a short-cut method of avoiding scrupulous adherence to these submitter-notice procedures.[51]

Similarly, the procedures in the executive order do not provide for an administrative appeal of an adverse decision on a submitter's claim for confidentiality. The lack of such an appeal right has not been specifically considered by the D.C. Circuit, but it was recently addressed by the District Court for the District of Columbia, which flatly rejected a submitter's contention that an agency's decision to disclose information "must" be subject to an administrative appeal.[52]

The Court of Appeals for the Fourth Circuit had an opportunity to confront this issue in Acumenics Research & Technology v. Department of Jus-

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[46] 975 F.2d at 879.

[47] See FOIA Update, Spring 1993, at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking"); see also id. at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4").

[48] See id. at 7.

[49] Id.

[50] See National Org. for Women v. Social Sec. Admin., 736 F.2d at 746; accord CNA, 830 F.2d at 1159.

[51] See, e.g., Federal Elec. Corp. v. Carlucci, 866 F.2d 1530, 1531-33 (D.C. Cir. 1989).

[52] Lykes Bros. S.S. Co. v. Pena, slip op. at 6.

tice.[53] There, in analyzing Department of Justice regulations which do not provide for an administrative appeal, the Fourth Circuit found that the procedures provided for in the regulations--namely, notice of the request, an opportunity to submit objections to disclosure, careful consideration of those objections by the agency, and issuance of a written statement describing the reasons why any objections were not sustained--in combination with a "face-to-face meeting that, in essence, amounted to an opportunity to appeal [the agency's] tentative decision in favor of disclosure," were adequate.[54] The Fourth Circuit, however, expressly declined to render an opinion as to whether the procedures implemented by the regulations alone would have been adequate.[55]

Likewise, the Court of Appeals for the Ninth Circuit has upheld the adequacy of an agency's factfinding procedures that did not provide for an administrative appeal per se.[56] In that case, the agency's procedures provided for notice and an opportunity to object to the request, for consideration of the objection by the agency followed by a written explanation as to why the objection was not sustained, and then for another opportunity for the submitter to provide information in support of its objection.[57] After independently reviewing the record, the Ninth Circuit found that such procedures were adequate.[58] Accordingly, it held that the agency's decision to disclose the information did not require review in a trial de novo.[59]

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[53] 843 F.2d at 805.

[54] Id.

[55] Id. at 805 n.4.

[56] Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d at 1348.

[57] Id.

[58] Id.

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